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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

In January, the Executive Committee held an interesting and constructive Midwinter Meeting at Camelback Inn in picturesque Arizona. More than fifty members, including nine past presidents of the Association, with their wives were in attendance. The meeting was not only socially delightful but was filled with accomplishments. Our members in Arizona showed an active interest and participated in the functions. The Industry Cooperation Committee, which by official act has been changed to the Defense Research Committee, met simultaneously with the Executive Committee. One of the more important actions coming out of these meetings was the authorization for the publication of a newsletter. You have already seen this new publication, "FOR THE DEFENSE". To repeat a part of my President's Message, appearing in the first issue, the success of this newsletter will depend very materially on the cooperation accorded its editors by each of you in furnishing timely, appropriate material to appear therein. It is your publication and entitled to your wholehearted support.

The Midwinter Metropolitan Meeting, held at the Hotel Plaza on January 30, 1960, further justifies this affair being considered one of the great institutions within our Association. Price Topping and his co-workers, Milton Baier and Ernest Fields, did a magnificent job, as always, in organizing and running this so-called unofficial but exceptionally enjoyable gathering in New York City. This year's meeting was well-attended. Past presidents, current officers, members of the Executive Committee of the Association and their wives joined with others in renewing old friendships and making new ones among the nearly two hundred gathered for an afternoon of sociability. The present President and two past presidents of the American Bar Association were there as well as the present President and a past President of the American College of Trial Lawyers. It is earnestly suggested that every effort be made to attend this function held annually on the last Saturday in January.

The program for the 1960 Annual Meeting and a personnel list of the Convention Committees appear in this volume. Present reservations indicate a record-breaking attendance. The members and guests of the Association, with their families, will be the only occupants of The Greenbrier. A diversified program, with something of interest to everyone, has been planned. The entertainment will be on the usual high plane. Our Thirty-third Annual Convention gives promise of being outstanding in all respects.

Space does not permit recording here the productivity of our committees this year. They have generously supported the Journal and several are sponsoring programs for our July meeting. Our chairmen and committee members merit the everlasting gratitude of the Association. The Defense Research Committee, so ably headed by Stanley C. Morris, Charleston, West Virginia, a past President of the Association, deserves special praise. This committee met at the expense of its individual members at Miami Beach, Florida, in August, Hot Springs, Virginia, in October, Arizona in January, and also held a meeting of its implementation committee in Chicago in February. The plans being laid and the program being evolved by this committee unquestionably will have a far-reaching effect on the future welfare of the Association, its members, the industry with which we are so closely identified, the defense segment of the bar, and the profession generally.

CHARLES E. PLEDGER, JR., *President*

CURRENT DECISIONS

Recent decisions of the courts dealing with insurance and negligence law and practice are included in these pages. Journal readers are asked to send in digests of such rulings. Unreported cases dealing with novel questions are especially desired. Members of I.A.I.C. should submit their contributions to their State Editors.

Edited by
R. HARVEY CHAPPELL, JR.
Richmond, Virginia

AUTOMOBILE INSURANCE—ASSAULT HELD TO BE AN ACCIDENT

Jernigan v. Allstate Insurance Company, 269 F.2d 353 (1959), rehearing denied in 272 F.2d 857 (1959)

Insurer Allstate Insurance Company brought a declaratory judgment proceeding seeking a determination that it was not liable under an automobile liability policy for the death of Jernigan and the damage to the insured automobile on the ground that the insured's aunt operating the automobile covered by said policy intentionally and wilfully drove the automobile over Jernigan inflicting the injuries from which he died. The question presented was whether the occurrence resulting in Jernigan's death and damage to the car was an accident under the terms of the policy. The insured had permitted his aunt, a licensed and registered driver, to drive the automobile at the time and place of the injuries involved without knowledge that she was under any mental stress or infirmities. There being no cases directly in point in Louisiana, where the accident occurred, the Fifth Circuit Court of Appeals concluded that under the general law which the courts of Louisiana probably would follow the injury and property damage were caused by an accident, the court observing that whether an assault constitutes an accident appears to depend on the person from whose standpoint the court views the occurrence, the so-called majority rule viewing the matter from the position of the injured party. On petition for rehearing the Fifth Circuit Court of Appeals commented that the forceful petition for rehearing made it desirable that the principles on which the decision was based be brought into sharper focus and then proceeded to restate the principles set forth in the original opinion. The petition was denied, Chief Judge Rives dissenting. (Contributed by F. Carter Johnson, Jr., New Orleans, Louisiana)

AUTOMOBILE INSURANCE—COOPERATION CLAUSE

Central National Insurance Co. v. Horne, 326 S.W. 2d 141 (Tenn., 1959)

Horne, while carrying $100.00 deductible collision insurance with Central National, was involved in an accident in Kentucky which caused damages to his automobile. Central National paid the amount of such damages less the deductible sum and thereafter brought suit against the driver of the other automobile in an effort to recoup the loss under its subrogation claim. During the pendency of the suit Horne was transferred to Tennessee from Kentucky by his employer and he notified the insurer of his change of address. The subrogation action was set for trial in Kentucky on several occasions but at none of these settings did Horne appear to testify on behalf of the insurer. Upon losing the subrogation suit Central National filed this action against Horne, its insured, contending that Horne's failure or refusal to appear at the trial was the cause of its failure to recoup the loss. The trial court dismissed the action and on appeal the action of the trial court was affirmed. The Court of Appeals of Tennessee held that the cooperation clause of the automobile insurance policy applies only to cases brought against the insured and does not contemplate a situation in which the insured fails to cooperate in the insurer's suit against a third party pursuant to subrogation rights. (Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

**AUTOMOBILE INSURANCE—
MATERIAL MISREPRESENTATION
JUSTIFIES POLICY CANCELLATION**

Keys v. Pace, 99 N.W.2d 547 (Mich., 1959)

Insured was involved in an automobile accident and insurer, through its attorneys, entered appearance on behalf of insured and filed responsive pleading. Several months thereafter the attorneys filed a motion to withdraw as attorneys for such defendant supported by an affidavit asserting that the answer to one of the questions in the defendant-insured's application for insurance was false and the knowledge of falsity was acquired subsequent to the appearance of the attorneys in the case. The trial court thereupon allowed the attorneys to withdraw but specifically providing that the entry of such order should not be construed to adjudicate in any way the liability of the insurer. Thereafter judgment was obtained against the insured and the judgment plaintiff brought garnishment proceedings against the defendant-insured and the insurer. The evidence disclosed that the insured in the application for insurance denied that his operator's license had been revoked, suspended or refused within the preceeding three years although his operator's license had just been returned upon completion of two years' probation during which he had not been allowed to drive and had been required to surrender his license. The Supreme Court of Michigan held that the insured was guilty of material misrepresentation and, therefore, that the insurer was entitled to cancel the policy ab initio, withdraw its legal representation of the insured and had not waived the cause of forfeiture. (Contributed by James R. Daoust, Detroit, Michigan)

**DEATH BY WRONGFUL ACT—
BENEFICIARY CANNOT RECOVER
IF NEGLIGENCE CAUSED DEATH**

Ditty v. Farley, 347 P.2d 47 (Ore., 1959)

A husband was driving to their common place of employment with his wife and enroute they were involved in a collision with another car resulting in the wife's death. Suit was sought to recover for the wrongful death of the wife. Among other things the Supreme Court of Oregon held that the husband-wife relationship and their driving to work together did not constitute a joint venture and that the negligence of the husband-driver could not be imputed to the wife-passenger. However, the court further held that since the husband was the sole designated beneficiary of his wife's estate under the Oregon Wrongful Death Statute, he could not profit by his own wrong and his own contributory negligence barred any recovery by the plaintiff administrator.

**DISCOVERY—
DISCLOSURE OF LIABILITY
INSURANCE**

Lucas v. District Court, 345 P.2d 1064 (Colo., 1959)

The Supreme Court of Colorado has held that the existence and limits of liability insurance may be required to be disclosed under a state discovery rule similar to Federal Rule of Civil Procedure 26 (b). The majority of the court were of the opinion that such disclosure was "relevant" to the subject matter of an automobile accident case. Chief Justice Knauss and Justices Hall and Sutton rendered vigorous dissents. See Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits,* 27 Insurance Counsel Journal 122 (January, 1960).

**EVIDENCE—
TESTIMONY OF SAFETY ENGINEER
ADMISSIBLE**

Leeper v. Thornton, 344 P.2d 1101 (Okl., 1959)

Drivers of both automobiles involved in a headon collision were killed, there being no eye witnesses. A highway patrolman who investigated the accident testified for the plaintiff on the question as to which of the automobiles had crossed the highway center line and entered the other vehicle's traffic lane. On this point the defendant's witness was a safety engineer who commenced his investigation of the accident approximately 1½ years after it had occurred. The Supreme Court of Oklahoma upheld a verdict for the defendant ruling admissible the testimony of the safety engineer. But see *Venable v. Stockner,* 108 S.E. 2d 380 (Va., 1959), 26 Insurance Counsel

Journal 452 (October, 1959), in which under similar factual circumstances the testimony of such a safety engineer or accident analyst was held inadmissible by the Supreme Court of Appeals of Virginia.

EXCESS LIABILITY–
INSURED NOT REQUIRED TO PROVE PAYMENT OF EXCESS IN ORDER TO RECOVER

Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dalrymple, 116 So.2d 924 (Ala., 1959)

The insured, Dalrymple, sued the insurer, Alabama Farm Mutual Casualty Insurance Company, for the overage when the verdict of the jury exceeded the policy limits, the insured claiming that the insurer had an opportunity to settle within the policy limits prior to the verdict. From a verdict and judgment for the plaintiff-insured, the insurer appealed, one of the defenses being that the plaintiff-insured had not paid the excess judgment. The Supreme Court of Alabama reviewed the various authorities including those which hold that in order to warrant a recovery the plaintiff-insured must prove either that he has paid the excess or at least that his financial status is such that it is sure to be collected. However, the court went on to adopt what it thought to be the sounder view, namely, that the insured is not required to prove that he actually has paid the excess judgment rendered against him in order to recover from the insurer. The court observed that to do otherwise would create a windfall to an insurer fortunate enough to have an insolvent as its insured. (Contributed by George W. Yancey, Birmingham, Alabama, Editor Emeritus)

EXCESS LIABILITY–
NEW JERSEY ADOPTS GOOD FAITH RULE

Radio Taxi Service, Inc. v. Lincoln Mut. Ins. Co., 157 A.2d 319 (N.J., 1959)

A taxicab of Radio Taxi Service, Inc., was involved in a collision with an automobile owned and driven by Meyers. The cab was insured under an automobile liability policy issued by Lincoln Mutual Insurance Company with limit of $5,000.00. Meyers recovered a judgment against the insured in the amount of $13,500.00 and the insured then brought suit against the insurer to recover the $8,500.00 balance of the judgment. The complaint charged that the defendant insurer had failed to use due care in investigating the accident and in preparing the case for trial and was guilty of negligence and of failure to act in good faith in refusing to accept an offer to settle the Meyers claim within the $5,000.00 limit of the policy. The defendant insurer's motion for a judgment of dismissal was granted by the lower court and on appeal this action was affirmed. The Supreme Court of New Jersey reviewed the numerous authorities as well as the two tests of liability, namely, the negligence test and the good faith test. The New Jersey Supreme Court then held that the principle which gives fair and just recognition to the interest of both parties to the insurance contract is that the obligation assumed by the insurer with respect to settlement is to exercise good faith in dealing with offers of compromise, having both its own and the insured's interests in mind. The court further saw fit to refer to *American Casualty Co. of Reading, Pa. v. Howard,* 187 F.2d 322 (4 Cir., 1951), with the statement:

> "The law does not expect an insurer to be gifted with powers divination or of accurate prophecy."

Justices Burling and Jacobs dissented, the court having divided 4 to 2.

LIABILITY–
MUNICIPAL PARK IS A PROPRIETARY FUNCTION FOR WHICH THERE IS NO IMMUNITY

Murphy v. City of Carlsbad, 348 P. 2d 492 (N.M., 1960)

An infant brought suit for injuries suffered in a municipal park owned and operated by the City of Carlsbad. The infant was injured by a carrousel or merry-go-round which normally was operated during the summer season but which at the time of the accident was not in operation and was partially dismantled. The theory of the plaintiff's case was that of attractive nuisance. The City filed a motion to dismiss on the ground that the operation of the municipal park was a governmental function and not a proprietary one and the

motion to dismiss was sustained by the trial court. On appeal the Supreme Court of New Mexico reversed and remanded, holding that the establishment and maintenance of a municipal park is a proprietary function and that a city is not immune to suit for negligence in connection therewith. See, also, *Molitor v. Kaneland Community Unit District No. 302*, 163 N.E. 2d 89 (Ill., 1959), in which the Supreme Court of Illinois held that a school district would be liabile in tort for the negligence of its employee, Justices Davis and Hershey, dissenting. (Contributed by John P. Cusack, Roswell, New Mexico, State Editor for New Mexico)

LIABILITY–
RIFLE MANUFACTURER LIABLE DESPITE PLAINTIFF'S ALTERATION OF RIFLE

Webb v. Olin Mathieson Chemical Corporation, 342 P.2d 1094 (Utah, 1959)

Plaintiff purchased a rifle manufactured by the defendant and, following the purchase, made several alterations including the replacement of the barrel, the re-sizing of the bore and chamber of the second barrel, and alterations in the design of the breech end of the new barrel. While being fired the gun blew up, removing part of plaintiff's finger. In an action against the manufacturer the jury returned a verdict for the plaintiff. On appeal, the Supreme Court of Utah affirmed the judgment holding inter alia that "there was a conflict in the evidence upon the issues and they were properly submitted to the jury. It is a declared policy of this court to zealously protect the right of trial by jury not to take issues from them and rule as a matter of law, except in clear cases." In a vigorous dissent Justice Henriod, joined in by Justice Callister, said in part:

> "As to any diefication of the jury system, I do not consider it sacrilegious or irreverent to urge that apostasy is in order where the veniremen become heretical and kneel to worship the false god of unreason. I think this case calls for such an apostasy. I believe we should do something more than render lip service to a system just because it is a system, or espouse any concept or near concept that suggests the infallibility of juries.
>
> "In my opinion the wholly uncalled for, unreasonable, unauthorized and negligent transmutation of an article bearing the reputation of a well known, national manufacturer into an instrument of danger, by one having a passion for flouting recommended operational and functional standards, points up an inescapable contributory negligence, that, as a matter of law, calls for denial of recovery."

(Contributed by R. Newell Lusby, New York, New York)

LIABILITY–
SALE OF GASOLINE TO MINOR DOES NOT AFFIX LIABILITY FOR PERSONAL INJURIES

Tharp v. Monsees, 327 S.W.2d 889 (Mo., 1959)

An action was brought on behalf of a minor against the owner and operator of a service station. The service station owner sold to an eleven year old boy a pint of gasoline and a glass container with a lid on it. Part of the gasoline was used in order to clean paint brushes. The balance of the gasoline was used by several boys in playing with matches during the course of which the four year old plaintiff was badly burned. The action was predicated on the theory that the defendant was guilty of negligence in selling a dangerous inflammable substance to a minor and that such alleged negligence was the proximate cause of the plaintiff's injuries. From a jury verdict of $48,000.00 the defendant appealed. The Supreme Court of Missouri reversed the judgment and held that the defendant was entitled to a directed verdict. The court noted that there is no statute involved prohibiting the sale of gasoline to minors nor is it unlawful to put gasoline in a glass container where the quantity was such as that involved in the case at bar. Hence, negligence per se was not involved. Further, to make out a submissible negligence case for the jury there must be substantial evidence not only of negligence, but that such negligence directly caused or contributed to directly cause the plaintiff's injury. The injury of the plaintiff was not a natural and probable result of the sale of the gasoline. (Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

LIABILITY—
SUPERMARKET NOT LIABLE TO CUSTOMER FOR FALLING OVER STOCK TRUCK IN AISLE

Mudge v. Stop & Shop, Inc., 162 N.E.2d 670 (Mass., 1959)

As plaintiff customer started down an aisle in defendant supermarket, she saw an unattended stock truck with two or three cartons of goods on it. The truck was angled out into a five foot aisle. Plaintiff stopped near the truck for a couple of minutes and talked with friends and then turned around, took one or two steps and fell over the front part of the stock truck. She had forgotten it was there. The Massachusetts Supreme Judicial Court held that the defendant supermarket should have received a directed verdict. The court observed:

> "It is common knowledge that in supermarkets * * * shelves are frequently replenished by means of trucks of the sort over which the plaintiff tripped. These devices are necessary to the conduct of such a store and the customer must be deemed to know of their presence. In the case at bar it is clear that the plaintiff had such knowledge. The presence in the aisle for a few minutes of a stock truck was not something that the storekeeper was obliged to warn against anymore than in the case of a customer who had left his cart in the aisle while obtaining an article from the shelves. * * *".

(Contributed by Robert P. Cook, Boston, Massachusetts)

LIFE INSURANCE—
ASSIGNEES NOT ENTITLED TO NOTICE OF LAPSE

Goldheim, Administratrix v. Connecticut Mutual Life Insurance Company, — F.2d — (D.C. Cir., January 19, 1960)

Administratrix of the estate of an insured appealed the decision of the trial court denying recovery on policies of life insurance which had lapsed prior to the death of her decedent. The policies had been assigned to creditors. The policies had lapsed for non-payment of premiums before the death of the insured but notice of non-payment and lapse had not been given to the assignees. The assignments had been accepted by the insurer. The United States Court of Appeals for the District of Columbia held that in the absence of a contract obligation either in the policy or in the assignment itself, there was no requirement for notices to the assignees. The insurer had no obligation to give notice to the assignees of non-payment of premiums or of the lapsing of the policy and the decision of the trial court was affirmed.

RELEASE—
GOVERNED BY LAW OF STATE WHERE TORT COMMITTED

Bittner v. Little, 270 F.2d 286 (3 Cir., 1959)

Plaintiff, defendants and one Waring were involved in a three car collision in Virginia, the plaintiff and Waring being citizens of New York and the defendants being citizens of Pennsylvania. Plaintiff filed suit in New York state court against the administratrix of Waring's estate which suit was settled and a "general release" was given by the plaintiff to the administratrix of Waring's estate. Plaintiff then sued defendants in the United States District Court for the Eastern District of Pennsylvania and the suit was dismissed on motion of the defendants. On appeal the Third Circuit Court of Appeals affirmed the action of the lower court, holding that the conflict of laws rule of Pennsylvania must be applied and that in a case involving a tort in another state Pennsylvania follows the general rule of reference to the place of wrong for the legal effect to be given the facts and events. This general rule that the substantive rights of the parties are to be governed by the law of the place where the injury was sustained leads to the law of the state of Virginia in which state it is well settled that the release of one joint tort feasor releases the others jointly liable for the same wrong or injury. It also was contended that there was no joint tort feasor relationship between the administratrix of Waring's estate and the defendants here so as to make operative the Virginia rule, but the Third Circuit Court of Appeals held that this contention was without basis and that an injured party is entitled to only one satisfaction for any one injury.

TRIAL TACTICS– RAILROAD GRANTED NEW TRIAL BY REASON OF SYMPATHY DEMONSTRATION

Fitzpatrick v. St. Louis-San Francisco Railway Co., 327 S.W.2d 801 (Mo., 1959)

A brakeman brought an action under the Federal Employer's Liability Act against the railroad for the loss of an eye. The jury awarded the plaintiff $60,000.00 damages for the loss of the eye and by remittitur the recovery was reduced to $45,000.00 from which judgment the railroad appealed. As one of its grounds for a new trial, the railroad urged that the trial court committed prejudicial error in refusing to declare a mis-trial because a blind man carrying a white cane and cigar box entered the courtroom escorted by a guide and took seats in a bench immediately behind the one in which the plaintiff and plaintiff's wife and daughter were seated. From the record it appears that the blind man was a friend of counsel for the plaintiff and came into the courtroom with the full knowledge of counsel for the plaintiff. The trial court overruled the railroad's motion for a mis-trial. The Supreme Court of Missouri held that a new trial should be granted, stating:

> "* * * In our view of the matter the courts cannot permit the verdict to stand and thereby give tacit approval to the occurrence even though it was inadvertently or thoughtlessly permitted to happen. * * * In order to warrant a new trial it is not necessary that an episode such as this be deliberately contrived for the purpose of creating sympathy for the plaintiff or prejudice toward the defendant, nor is it necessary that it be conclusively shown that members of the jury were actually influenced for that would seldom be possible. The arousing of sympathy or prejudice is often so subtle that the person affected is the last to become aware of it or admit its existence. Otherwise, the reaction of the average person would be resentment. It is for the court not for the jurors to say whether they are likely to have been influenced by such occurrence. * * * In personal injury actions exhibits or demonstrations not relevant or competent on any issue which are likely to arouse sympathy for the plaintiff or antipathy for the defendant are improper and should be avoided. * * *"

(Contributed by R. Newell Lusby, New York, New York)

TRIAL TACTICS AND EVIDENCE– EMOTIONAL APPEAL TO JURY DISAPPROVED

Faught v. Washam, 329 S.W.2d 588 (Mo., 1959)

Defendant appealed from a $20,000.00 judgment entered on jury verdict in a damage suit for personal injuries to plaintiff arising out of an automobile accident. The Supreme Court of Missouri set aside the judgment and remanded the cause for the cumulative prejudicial effect of errors of the trial court primarily involving the admission in evidence of colored photographs of plaintiff's injuries and the improper argument of plaintiff's counsel to the jury. In holding that the admission of the colored photographs was improper the court observed that caution must be exercised in admitting photographs which may tend to exaggerate the seriousness and extent of injuries, stating:

> "As for the six colored photographs in the instant case, we have sufficient familiarity with the male limbs to know that the limbs shown in these photographs are not portrayed in their *natural color* (and certainly the same is true with respect to the backgrounds), and we have had sufficient experience in trial practice (inapt as we may have been in that field) to perceive the probable inflammatory impact of such photographs depicting sympathy-provoking injuries in 'high and unrealistic colors' ".

Further, in disapproving the various arguments of plaintiff's counsel for an "adequate award", the Missouri Supreme Court stated:

> "From time immemorial, the judicial measure of damages for pain and suffering has been fair and reasonable compensation * * * because there is and can be no established standard, fixed basis, or mathematical rule by which such damages may be calculated. * * * Only within the past five years have resource-

ful and ingenious counsel developed the 'trial technique' of appealing to the jury to follow a mathematical formula in admeasuring damages for pain and suffering. Cases in this jurisdiction have gone no further than to uphold that counsel's 'mere argumentative suggestion' of a lump sum does not constitute reversible error, and no Missouri case discussing the so-called mathematical formula technique has been cited or found. Among other appellate courts, by whom this technique has been considered, there is a sharp cleavage, some approving and some disapproving, with no strong preponderance either way. * * * To us, the considerations advanced by the authorities disapproving the mathematical formula argument are most persuasive. Whatever may be the cold logic or academic theory of the matter, the ungilded reality is that such argument is calculated and designed to implant in the jurors' minds definite figures and amounts not theretofore in the record (and which otherwise could not get into the record) and to influence the jurors to adopt these figures and amounts in evaluating pain and suffering and in admeasuring damages therefor. If an argument of this character is permissible and proper, it would be just as logical, and equally fair, to permit 'expert witnesses' to evaluate pain and suffering on a per diem or per hour basis—a revolutionary innovation which, so far as we are advised, not even the most ardent zealots of the mathematical formula technique have (as yet) proposed. * * *"

See also 27 Insurance Counsel Journal 13-14 (January, 1960).

WORKMEN'S COMPENSATION—MENTAL ILLNESS NOT COMPENSABLE

Chernin v. Progress Service Co., 192 N.Y.S. 2d 758 (1959)

Claimant taxicab driver was involved in an automobile accident when a pedestrian darted in front of and came in contact with his cab. The pedestrian fell to the pavement and was taken to the hospital in an unconscious state. The claimant suffered no physical injury. A short while thereafter he was admitted to Bellview Hospital suffering from a mental condition. At the workmen's compensation hearing there was evidence to the effect that the claimant sustained personality changes subsequent to the accident. Medical testimony indicated that the accident caused psychological trauma aggrevating a dormant repressed schizophrenia. The Appellate Division of the New York Supreme Court held that the resulting mental disability was not compensable under the provisions of the Workmen's Compensation Law, there being no "physical hurt".

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INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
33rd ANNUAL CONVENTION—JULY 6, 7, 8 and 9, 1960
THE GREENBRIER
WHITE SULPHUR SPRINGS, WEST VIRGINIA

Tuesday, July 5

10:00 A.M. Meeting of Defense Research Committee—West Virginia Room.

Wednesday, July 6

9:30 A.M. Meeting of Executive Committee—Directors Room.

2:00 P.M. Registration of Members and Guests—Chesapeake Foyer.

4:00 P.M. Meetings of Standing and Special Committees appointed by President-Elect Denman Moody. Meeting places will be posted on Association's Bulletin Board in Chesapeake Foyer.

5:30 P.M. Get-Acquainted "Coketail" Party for Junior Group—Washington and Lee Rooms.

Thursday, July 7

8:00 A.M. Continued registration of Members and Guests—Chesapeake Foyer.

9:00 A.M. GENERAL SESSION—Chesapeake Hall.

1. Invocation—The Reverend Charles W. Paskel, Pastor of the Emmanuel Methodist Church, White Sulphur Springs, West Virginia.
2. Roll Call and Reading of Minutes.
3. Address of Welcome—Honorable Cecil H. Underwood, Governor of West Virginia, to be introduced by James M. Guiher, Clarksburg, West Virginia.
4. Response—E. D. Bronson, San Francisco, California.
5. Introduction of New Members—John A. Kluwin, Milwaukee, Wisconsin, Chairman, Men's Reception Committee.
6. Introduction of Guests of the Association by the President.
7. Report of President—Charles E. Pledger, Jr., Washington, D. C.
8. Report of Secretary-Treasurer—George McD. Schlotthauer, Madison, Wisconsin.
9. Report of the Editor—William E. Knepper, Columbus, Ohio.
10. Report of Memorial Committee—F. B. Baylor, Lincoln, Nebraska, Chairman.
11. Report of Defense Research Committee—Stanley C. Morris, Charleston, West Virginia, Chairman.
12. Address—Harold G. Evans, President, American Casualty Company of Reading, Pennsylvania. Subject: *"Challenge of Progress"*.
13. Announcements:

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(a) Open Forum and Panel Discussion Committee —Sanford M. Chilcote, Pittsburg, Pennsylvania, Chairman.
(b) General Entertainment Committee—Wilson Anderson, Charleston, West Virginia, and Richard W. Galiher, Washington, D. C., Co-Chairman.
(c) Ladies' Bridge and Canasta Committee—Mrs. Harold A. Bateman, Dallas, Texas, Chairman.
(d) Ladies' Golf Committee—Mrs. Verling C. Enteman, Newark, N. J., Chairman.
(e) Ladies' Reception Committee for Wives of New Members—Mrs. James D. Fellers, Oklahoma City, Oklahoma, Chairman.
(f) Men's Bridge and Canasta Committee—Charles P. Gould, Los Angeles, California, Chairman.
(g) Men's Golf Committee—Harvey E. White, Norfolk, Virginia, Chairman.
(h) Men's Tennis Committee—Robert D. Norman, Birmingham, Alabama, Chairman.
(i) Junior Entertainment Committee—Mrs. Edward B. Raub, Jr., Indianapolis, Indiana, Chairman.

14. Appointment of Nominating Committee.
15. Announcement by Chairman of Nominating Committee.

12:30 P.M. Ladies' Reception for Wives of New Members—Old White Patio.

1:00 P.M. Ladies' Luncheon—Mural Room.

1:45 P.M. OPEN FORUM—Theatre.

Presiding: Sanford M. Chilcote, Pittsburg, Pennsylvania, Chairman, and Harold A. Bateman, Dallas, Texas, Vice-Chairman, Open Forum and Panel Discussion Committee.

"Tort Trends and Trial Tactics"—Professor Robert W. Miller, College of Law, Syracuse University, Syracuse, New York, Managing Editor, "For the Defense".

"Nuclear Energy", under sponsorship of Nuclear Energy Committee, Harley J. McNeal, Cleveland, Ohio, Chairman, and Wallace E. Sedwick, San Francisco, California, Vice-Chairman.

Dr. Paul C. Aebersold, Assistant Director for Isotope Development, Atomic Energy Commission. Subject: *"Developments in Use of By-product Material"*.

Harold L. Price, Director, Division of Licensing and Regulation, Atomic Energy Commission.

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Subject: *"Safety Considerations Involved in Licensing Nuclear Materials and Facilities"*.
David Toll, Staff Counsel to Joint Committee on Atomic Energy. Subject: *"Federal-State Relations in Regulating Radiation Hazards"*.
E. A. Cowie, Vice-President, Hartford Accident and Indemnity Company, Hartford, Connecticut. Subject: *"Claim Procedures and Litigation in Connection with Bodily Injury and Third-Party Property Damage Claims"*.
Ashley St. Clair, Assistant Vice-President, Liberty Mutual Insurance Company, Boston, Massachusetts. Subject: *"Some Policy Interpretations of Nuclear Energy Policies of Insurance"*.

2:00 P.M. Ladies' Bridge and Canasta Tournament—Trellis Lobby.

5:30 P.M. "Coketail" Party for Junior Group—Washington and Lee Rooms.

6:00 P.M. President's Reception—Chesapeake Hall.

8:00 P.M. Dinner—Main Dining Room.

9:00 P.M. International Cabaret—Chesapeake Hall.

Friday, July 8

9:00 A.M. OPEN FORUM—Theatre.

Presiding: Sanford M. Chilcote, Pittsburg, Pennsylvania, Chairman, and Harold A. Bateman, Dallas, Texas, Vice-Chairman, Open Forum and Panel Discussion Committee.

"The Liability of the Shipowner for Injuries aboard Ship to Shoreside Workers and the Shipowner's Right to Indemnity against such Workers' Employers"—Lucian Y. Ray of McCreary, Hinslea and Ray of Cleveland, Ohio, under the sponsorship of Marine Insurance Committee, Wilder Lucas, St. Louis, Missouri, Chairman, and Lee C. Hinslea, Cleveland, Ohio, Vice-Chairman.

"Contribution and Indemnity among Tort Feasors"—W. Page Keeton, Dean of the University of Texas School of Law, Austin, Texas, President-elect of the Association of American Law Schools.

"The Anatomy of Life Insurance", John O. Todd, C.L.U., Special Agent representing the Northwestern Mutual Life Insurance Company

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and President of Todd Planning and Service Company, Evanston, Illinois, under sponsorship of Life Insurance Committee, Edward B. Raub, Jr., Indianapolis, Indiana, Chairman, and Arthur Crownover, Jr., Nashville, Tennessee, Vice-Chairman.

"Why the Increase in Malpractice Litigation"—Dr. Joseph S. Stewart, Miami, Florida, A. Lee Bradford, Miami, Florida, Chairman, and Edward J. Kelly, Des Moines, Iowa, Vice-Chairman, Malpractice Insurance Committee.

9:00 A.M. Ladies' Golf Tournament.
1:30 P.M. Men's Golf Tournament.
1:30 P.M. Men's Tennis Tournament.
2:00 P.M. Men's Bridge and Canasta Tournament—West Virginia Room.
5:30 P.M. "Coketail" Party for Junior Group—Washington and Lee Rooms.
6:00 P.M. Humble Humbugs Party—Chesapeake Hall.
8:00 P.M. Annual Banquet—Main Dining Room—to be followed by Entertainment and Dancing—Chesapeake Hall.

Saturday, July 9

9:00 A.M. GENERAL SESSION—Chesapeake Hall.

1. Invocation—The Rev. Fr. Eugene A. Schmitt, Pastor, St. Charles Borromeo Catholic Church, White Sulphur Springs, West Virginia.
2. Report of the Winners of the Ladies' and Men's Golf, Bridge and Canasta Prizes and Men's Tennis Prizes—Wilson Anderson and Richard W. Galiher, Co-Chairmen, General Entertainment Committee.
3. Presentation and Recognition of Chairmen and Vice-Chairmen of Committees.
4. Unfinished Business.
5. New Business.
6. Address—Honorable David A. Pine, Chief Judge, United States District Court for the District of Columbia, Washington, D. C., to be introduced by J. A. Gooch, Fort Worth, Texas. Subject: *"I See A Cloud"*.
7. Report of the Nominating Committee.
8. Election of Officers and Members of Executive Committee.
9. Induction and Presentation of Gavel to President Denman Moody by retiring President Charles E. Pledger, Jr.
10. Adjournment by President Denman Moody.

2:00 P.M. Meeting of New Executive Committee—Directors Room.

Past Presidents at Mid-Winter Meeting

Nine past presidents of IAIC attended the Midwinter Meeting of the Executive Committee, at Camelback Inn, in January. Those present, and the dates when they served as chief executives of the Association, were (left to right): G. Arthur Blanchet, 1958-59; John A. Kluwin, 1956-57; J. A. Gooch, 1953-54; Paul J. McGough, 1946-47; Lowell White, 1947-48; Forrest A. Betts, 1957-58; Stanley C. Morris, 1954-55; L. Duncan Lloyd, 1949-50; George W. Yancey, 1932-34.

THIRTY-THIRD ANNUAL CONVENTION

THE GREENBRIER

WHITE SULPHUR SPRINGS, WEST VIRGINIA

JULY 6, 7, 8 AND 9, 1960

From the EDITOR'S NOTEBOOK

In this column, from time to time, the Editor will publish news and views that he believes may be of more than passing interest to the readers of the Journal. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed. Contributions to this column will be welcomed.

FOR THE DEFENSE, the new monthly newsletter published by IAIC under the managing editorship of Professor Robert W. Miller of Syracuse University College of Law, has met an enthusiastic response in the defense field. Publication began in March and the first issue went to some 5,000 defense lawyers, claim department executives, claim agents and adjusters. The mailing list has been increased for subsequent issues.

In his President's Message in the first issue of FOR THE DEFENSE, President Pledger said:

"We hope this is a constructive step in the preservation of the adversary system of the adminisitration of justice, which is dedicated to the proposition that every just personal injury claim shall be promptly and adequately compensated and every non-meritorious or exaggerated claim shall be effectively resisted. We believe that the strengthening of the defense bar will have a beneficial effect in impeding the constant erosion of the practice of law."

The same Regional Editors and State Editors who supply material for the Insurance Counsel Journal are assisting Professor Miller in publishing FOR THE DEFENSE. The Defense Research Committee, under the chairmanship of Past President Stanley C. Morris, is contributing material and is helping to make this newsletter available to defense lawyers throughout America, whether or not they are members of IAIC. Additional contributions are sought. As President Pledger has said:

"The success of this publication will depend in a large measure on having its pages reflect yesterday's decisions, trial and appellate, and last-minute items of interest to defense trial lawyers. Every ruling helpful to others should be promptly imparted by the one who procured it. A constant flow of material of this type and character to its readers will require the cooperation of each member of the Association. Every reader must play the role of contributor if we are to keep abreast of developments in the trial defense field."

FOLLOWING the procedure commenced a year ago the membership Roster is being distributed in a separate booklet to IAIC members. It contains an up-to-date list of the membership arranged alphabetically and geographically, a list of past officers and former members of the Executive Committee, the by-laws with all amendments to date, and a list of all committees. We hope you will find it useful.

A PROPOSED bill to permit, as a matter of right, the admission in evidence in tort actions of prints, black or white or colored, showing parts of the human anatomy, skeletons or parts thereof, or plaster reproductions of bone structure, has been disapproved by the Judicial Council of Massachusetts. The Council, which has been in existence since 1924, makes a continuous study of the organization rules and methods of procedure and practice of the judicial system of that commonwealth. In its adverse recommendation, the Council said that "the discretionary rule should exist in the interest of justice and its application by the trial judge should not, in our opinion, be forced by a wholesale mandatory statute".

THE doctrine of *stare decisis* was referred to as "the heart and core of Anglo-Saxon jurisprudence" in a recent

opinion of Judge John W. Peck, of the Supreme Court of Ohio. He went on to say:

"That doctrine is referred to as *stare decisis*, a phrase which is an abbreviation of a maxim adjuring the courts 'to stand by precedent, and not to disturb settled points.' *Ballard County v. Kentucky County Commissioners*, 290 Ky., 770, 162 S. W. (2d), 771. In urging such abandonment, the respondent argues that the doctrine, which he characterizes as 'of long standing and veneration in our jurisprudence,' should not control here because there are no property rights involved and the *Hoermle* decision is 'unsupported by the confirmation of time.' We are impressed by neither argument. It is true that the continuity provided by adherence to precedent affords confidence in property transactions, but ours are not a state and a nation alone of property; of at least equal importance is the confidence in our form of government which can only result from freedom from fluctuation. From this it follows that we cannot find the doctrine of *stare decisis* to be without application merely because the submission of the present case followed the decision of the *Hoermle case* by only a year to the day. On the contrary, to so promptly disavow a conclusion thoughtfully arrived at by this court would for all time to come cause its decisions to be suspect as fragile ephemeral things. In the American form of government the executive and legislative branches are provided to be subject to reasonably constant variation and one of the most ponderous counterweights provided by the judiciary to the balance of powers is that of continuity and steadfastness. This need for stability of principle has occasioned the doctrine of *stare decisis* and causes it to be compelling among those who would despair at seeing the judiciary become subservient to whim." *(State, ex rel. Allison v. Jones,* 170 Ohio St. 323, 164 N.E.2d 417, decided February 3, 1960.)

"TITLE companies have taken over the title work; bank and trust companies reap the executors' commissions; and workmen's compensation laws solve the damage litigation of industry. Offsetting this loss of practice, there has been a great increase in automobile damage cases, in corporate law, in tax litigation and in practice involving the innumerable state and federal agencies and commissions. Every hamlet has its lawyer; practice has become largely localized, and to an increasing extent specialized. The modern machinery of a modern law office has vastly increased legal production varying, of course, with the brains and industry of the users. Leatherbound books have given way to loose-leaf services as a quick source for the answers to legal problems. The standard law school courses on contracts, real estate and torts have been supplemented by dozens of special courses varying from mineral to space law. The scene changes so rapidly that today's yardstick for measuring legal needs, if one can be devised, may be worthless a few years from now." 46 A.B.A.J. 170.

OUR READERS SPEAK

Readers of the Journal are invited to use this department as a place to express their thoughts on subjects of insurance law, trial practice, and the like. The opinions expressed are, of course, those of the writers and are not necessarily the views of the Journal or the Association.

Editor of the Journal

Dear Sir:

The Advance Sheets of the Supreme Court Reporter dated January 1, 1960, came to my desk today, and I there find the text of the decision of the Supreme Court of the United States in the case of *Inman v. B. & O. R.R.*, 80 S.Ct. 242, in which Bill Kelly of Akron prevailed. I may be wrong, but I feel that this case has great significance for defense-minded people like ourselves.

In this case, Inman was a railroad flagman and brought suit in the state court of Ohio and recovered a judgment against the railroad for $25,000 under the F.E.L.A. because he, Inman, had been run down from the back by a drunken automobile driver who had run through a stop sign. The court of appeals reversed on the grounds that there was no negligence on the part of the railroad. The Ohio Supreme Court dismissed the appeal, but the Supreme Court granted certiorari and in a 5 to 4 decision the judgment of the court of appeals was affirmed.

The decision in itself seems correct and would not be a subject for comment were it not for the fate of similar cases which had been before that court previously.

Beginning long before, but culminating with *Rogers v. Missouri Pacific*, 352 U.S. 500, the Supreme Court seemed to classify F.E.L.A. cases for special treatment, and would grant certiorari wherever the issue of liability was taken away from the jury. Usually, as was the case in *Rogers*, the case would be reversed in favor of the employee by a divided court, the majority consisting of Warren, Black, Douglas, Clark and Brennan. Frankfurter has consistently insisted that the writ be dismissed as being improvidently granted, and has not voted on the merits. Harlan has likewise agreed with Frankfurter that the writs were improvidently granted, but has voted on the merits and dissented.

Whittaker, since his ascendency to that court, has likewise joined with Harlan, but up until the *Inman* decision, Stewart has not made his position known, unless by his position in the Jones Act cases of *Romero, Skovgard,* and *Halacki,* 79 Sup. Ct. 468, 503, 517.

In *Inman,* Clark, who has usually sided with Warren, Black, Douglas and Brennan, switched over to the other side, as he did in the case of *Ringhiser v. C. & O. R.R.*, 354 U.S. 901, which is known in railroad circles as the "Unsanitary Case". Frankfurter has now rather hesitantly voted on the merits in line with Whittaker and Harlan, and, as stated above, Stewart, for the first time, has joined with what has heretofore been the conservative minority.

The thing that makes this case particularly interesting in insurance circles is the fact that a very similar situation arose in the case of *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956). There, in what was in effect a 5 to 4 per curiam decision, an ordinary negligence case suffered the same fate that usually befell an F.E.L.A. case and a great many defendant's lawyers in insurance cases were quite alarmed over this apparent trend of the Supreme Court of the United States in *all* cases to hold that a jury verdict was sacrosanct.

Clark having dissented in the *Ringhiser* case, and Stewart, Clark, and Frankfurter having joined with the conservative minority in the *Inman* case, gives me at least a faint ray of hope.

Very truly yours,

Josh H. Groce
San Antonio, Texas

January 5, 1960.

Report of Metropolitan Mid-Winter Meeting of Members of International Association of Insurance Counsel

PRICE H. TOPPING, *Chairman*
New York, New York

THE eighteenth annual Mid-Winter Reception and Luncheon for members of the Association and their families and friends in the Metropolitan Area was held at the Hotel Plaza in New York on January 30, 1960.

This is a repetition of the annual get together started during World War II when transportation was curtailed. 175 members, wives and friends attended from 15 states and the District of Columbia, from California to Maine.

The occasion was particularly honored by the presence of a number of distinguished guests. President Charles E. Pledger, Jr. gave brief greetings. Other officers and Executive Committee members and wives introduced included Mrs. Pledger; G. Arthur Blanchet, immediate past President, and Mrs. Blanchet; William E. Knepper, Editor of the Journal; John C. Graham, Executive Committee member, and Mrs. Graham; David L. Tressler, Executive Committee member.

Thomas Thacher, Superintendent of Insurance for New York, and John D. Randall, President of the American Bar Association, were guests. They were introduced and gave brief greetings. Other members and guests introduced included David Maxwell and Harold Gallagher, past Presidents of the American Bar Association; Addison Keeler, President of the New York State Bar Association; Samuel Sears, President of the American College of Trial Lawyers, and Lewis Ryan, former President of the American College of Trial Lawyers.

Those who attended were:

Mr. & Mrs. Nick Adamo, White Plains, New York
Mr. Leonard Amdursky, Oswego, New York
Mr. & Mrs. Milton L. Baier, Buffalo, New York
Miss Betty Baldwin, New York, New York
Mr. & Mrs. James P. Beggans, Jersey City, New Jersey
Mr. & Mrs. James Beha, New York, New York
Mr. & Mrs. Alfred C. Bennett, New York, New York
Mr. & Mrs. Fred Benson, New York, New York
Mr. Jesse Benton, New York, New York
Mr. & Mrs. John Bergen, Geneva, New York
Mr. Emile Z. Berman, New York, New York
Mr. & Mrs. Morgan F. Bisselle, New Hartford, New York
Mr. & Mrs. G. Arthur Blanchet, New York, New York
Mr. & Mrs. Edmund S. Brown, Buffalo, New York
Mr. & Mrs. Edward Butterworth, Lynn, Massachusetts
Mr. & Mrs. James Callahan, White Plains, New York
Mr. James Carter, Albany, New York
Mr. Ray Caverly, New York, New York
Mr. & Mrs. Ross Chamberlin, New York, New York
Mr. & Mrs. Melvin Cohen, Newark, New Jersey
Mr. & Mrs. James Conaway, Jr., Wilmington, Del.
Mr. Virgil Cox, New York, New York
Mr. & Mrs. Lynn Detweiler, Philadelphia, Pennsylvania
Mr. & Mrs. Herbert Dimond, New York, New York
Mr. & Mrs. James Doak, Philadelphia, Pennsylvania
Mr. James B. Donovan, New York, New York
Mr. Walter G. Evans, New York, New York
Mr. & Mrs. William W. Evans, Paterson, New Jersey
Mr. Ernest W. Fields, New York, New York
Mr. Charles F. Fish, Binghamton, New York
Mr. Meyer Fix, Rochester, New York
Mr. & Mrs. Thomas Flood, White Plains, New York
Mr. Thomas Ford, Albany, New York
Miss Alba Formidoni, Trenton, New Jersey
Mr. & Mrs. Donald Gallagher, Albany, New York
Mr. Harold J. Gallagher, New York, New York
Mr. Paul Gouldin, Binghamton, New York
Mr. & Mrs. John Graham, Hartford, Connecticut
Mr. Thomas A. Harnett, New York, New York
Mr. & Mrs. Richard Hartig, New York, New York
Mr. & Mrs. Russ Hauck, White Plains, New York
Mr. Joseph Head, Philadelphia, Pennsylvania
Mr. & Mrs. Paul Higinbothom, Baltimore, Maryland
Mr. & Mrs. James Holleran, Binghamton, New York
Mr. & Mrs. Leffert Holz, New York, New York
Mr. William Junkerman, New York, New York
Mr. & Mrs. John Keale, Jersey City, New Jersey
Mr. & Mrs. Eugene Keegan, White Plains, New York

Mr. Addison Keeler, Binghamton, New York
Mr. & Mrs. James Kernan, Utica, New York
Mr. William E. Knepper, Columbus, Ohio
Mr. & Mrs. Donald Kramer, Binghamton, New York
Miss Evelyn Lahey, New York, New York
Mr. & Mrs. Merritt Lane, Jr., Newark, New Jersey
Mr. & Mrs. David F. Lee, Jr., Norwich, New York
Mr. & Mrs. David Levene, Binghamton, New York
Mr. Rowland Long, Springfield, Massachusetts
Mr. & Mrs. Clarence I. Lord, Trenton, New Jersey
Mr. & Mrs. Newell Lusby, New York, New York
Mr. & Mrs. David F. Maxwell, Philadelphia, Pennsylvania
Mr. Al Mayer, Summit, New Jersey
Mr. Percy McDonald, Memphis, Tennessee
Mr. & Mrs. William J. McDonald, Geneva, New York
Mr. James McIntosh, New York, New York
Mr. & Mrs. Edward McLaughlin, Rome, New York
Mr. & Mrs. Desmond McTighe, Norristown, Pennsylvania
Mr. Clarence Mellen, New York, New York
Mr. Robert W. Miller, Syracuse, New York
Miss Matty Mitchley, New York, New York
Mr. & Mrs. Alfred J. Morgan, New York, New York
Mr. & Mrs. George Morrison, New York, New York
Mr. & Mrs. Dennis O'Connor, Syracuse, New York
Mr. & Mrs. Samuel P. Orlando, Camden, New Jersey
Mr. & Mrs. Alexander Orr, Jr., New York, New York
Mr. & Mrs. James O'Shea, Rome, New York
Miss Norma Oswald, New York, New York
Mr. Edward Pacelli, New York, New York
Mr. & Mrs. John Paper, New York, New York
Mr. & Mrs. Fred Perabo, Newark, New Jersey
Mr. Bennett Perry, Henderson, North Carolina
Mr. & Mrs. Charles E. Pledger, Jr., Washington, D. C.
Mr. John D. Randall, Cedar Rapids, Iowa
Mr. & Mrs. Edward B. Raub, Jr., Indianapolis, Indiana
Mr. Nelson Robinson, Binghamton, New York
Mr. & Mrs. Orlando Rudser
Mr. Lewis Ryan, Syracuse, New York
Mr. & Mrs. Raymond J. Scully, New York, New York
Mr. Samuel Sears, Boston, Massachusetts
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Mr. & Mrs. Jay Shereff, Newark, New Jersey
Mr. William L. Shumate, New York, New York
Mr. & Mrs. Robert Skipworth, Rochester, New York
Mr. & Mrs. Joseph Spray, Los Angeles, California
Mr. & Mrs. Conrad Stearns, Binghamton, New York
Mr. & Mrs. Thomas Sullivan, Rochester, New York
Mr. Thomas Thacher, New York, New York
Mr. & Mrs. Price H. Topping, New York, New York
Mr. David Tressler, Chicago, Illinois
Mr. & Mrs. Warren Tucker, New Hartford, New York
Mr. Morris Tyler, New Haven, Connecticut
Mr. & Mrs. Wayne Van Orman, Newark, New Jersey
Mrs. Madeline Ossman Warner, New York, New York
Mr. & Mrs. Thomas Watters, New York, New York
Mr. Luther Ira Webster, Rochester, New York
Mr. & Mrs. George Whitehead, New York, New York
Mr. & Mrs. Donald Wilson, White Plains, New York
Mr. & Mrs. Joseph Woods, White Plains, New York
Mr. & Mrs. Saul J. Zucker, Newark, New Jersey
Mr. Melvin H. Zurett, Rochester, New York

Reviewing the LAW REVIEWS

ROBERT J. NORDSTROM*
Columbus, Ohio

EXPERT TESTIMONY AND THE RES IPSA LOQUITUR CASE

All trial lawyers are familiar with "res ipsa" cases; they are, however, less familiar as to when the doctrine applies and just how to proceed once they decide that it does apply. This article examines how expert testimony should (and should not) be used in a res ipsa loquitur case. It does it in an easy-to-read and very practical manner.

The author begins with the three generally accepted requirements for a res ipsa case: "(1) the accident must be of a kind which ordinarily does not occur in the absence of sombody's negligence; (2) the instrumentality causing the accident must have been within the exclusive control of the defendant; (3) the injury must have happened irrespective of any involuntary action on the part of the plaintiff." He examines each of these—especially the first—from a theoretical position and then proceeds to show how expert testimony has been used to strengthen both the plaintiff's and the defendant's claims under each.

Of special benefit to the trial lawyer will be two sections of the article: (1) Tactical Considerations—Plaintiff; and (2) Tactical Considerations—Defendant. In the first he deals with those cases in which plaintiff alleges specific negligence and also res ipsa. (On this subject, see topic 17 under Articles and Comments, below. He also shows in this first section how use by plaintiff of expert testimony may sometimes be to the advantage of defendant if his attorney knows how to argue to the court an unwise use. In the second section the author outlines several cases in which defendant used expert testimony wisely . . . . and unwisely. Excerpts from two actual transcripts highlight the problem and serve as an excellent guide for the defense lawyer—one to follow and one to avoid. The various defenses opened by the expert witness are discussed but the writer concludes that it is almost always wise for the defendant to use the expert to show "that such an accident as often happens despite the exercise of all due care. This destroys the foundation of res ipsa loquitur, and removes the basis for inferring negligence." He adds, however, two exceptions to this advice. Fricke, The Use of Expert Evidence in Res Ipsa Loquitur Cases. 5 Villanova Law Review 59-79.

Villanova University
School of Law
Villanova, Pennsylvania
$1.50 per issue

*Associate Dean and Professor of Law, College of Law, Ohio State University.

INSURANCE

The December, 1959, issue of the Texas Law Review is devoted to the subject of insurance. In all, there are four articles, one comment, and two case notes—all dealing with insurance. Three of these may be of special interest to the readers of this Journal:

1. *Automobile insurance.* The author of this article (Professor P. R. Loiseaux, University of Texas School of Law) discusses the four principal insurance solutions to the 38,000 deaths and 1,200,000 injuries that will occur on our highways in 1960. These are (a) compulsory insurance statutes (found in Massachusetts, North Carolina, and New York), (b) safety responsibility laws (enacted in 49 states), (c) unsatisfied judgment fund laws (passed in North Dakota, New Jersey, New York, Delaware and Maine), and (d) the uninsured motorist coverage poli-

cy provisions (required only in Virginia). This article is primarily factual, being content merely to state the effect of the different plans. The author in his last paragraph, however, recommends the plan as adopted by New York. Lioseaux, Innocent Victims 1959 (pages 154-166).

2. *Construction of liability insurance terms.* This article is centered primarily on the construction of the cancellation clause. It states the "majority rule" (which allows cancellation irrespective of whether notice was actually received) and the "minority rule" (which gives, in varying degrees, effect to the fact that notice of cancellation was not received by the insured). Some states have accepted the minority position by virtue of judicial opinion (e.g., California, Florida, Georgia, Minnesota, and Missouri); others by virtue of statute (e. g., Iowa). The article discusses in some detail the actual effect of nonreceipt of the notice of cancellation and cites many cases from most American jurisdictions. Like the preceding article, however, it is content with surveying our present position. Risjord, Construction of Terms of Liability Insurance with Specific Reference to the Cancellation Conditions. (pages 198-210).
3. *Liability of insurer beyond policy limits.* This student comment treats a problem that has had frequent appearance in law reviews. It considers the liability of an insurer that either negligently or in bad faith refuses to settle a claim against the insured. A strength of the comment appears in the sections dealing with the factors of negligence, due care, bad faith, and good faith. It also treats procedures of and prerequisites to suits against an insurer. This comment is worth reading; indeed, in its analysis it is one of the better writings dealing with this subject. Dye, Insurer's Liability for Judgments Exceeding Policy Limits (pages 233-247).

The other articles cover life insurance in estate planning and group insurance for employees. 38 Texas Law Review 137-256.

University of Texas
School of Law
Austin, Texas
$2.00 per issue.

THE PRIMA FACIE CASE IN NON-JURY TRIALS

The latest issue of the University of Chicago Law Review contains an article by Professor Roscoe Steffen (University of Chicago Law School) that will be of interest to attorneys trying cases in Federal Courts. His particular inquiry is into the third sentence of Rule 41 (b) of the Federal Rules. This sentence reads: "In an action tried by the court without a jury the court as trier of the facts may then (after plaintiff has presented his evidence and on motion to dismiss by defendant) determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

His conclusion is that the sentence should be deleted as a "misbegotten offspring of an unseemly desire for speed and hurry." Fortunately for defense counsel, the cases discussed in the article do not seem to share Professor Steffen's unhappiness with this portion of Rule 41 (b). The article is worthy of a close reading, not only for its logic but also for its copious citations. The author discusses the practical application of the "substantial evidence" test versus the "weighing of evidence" test as they affect this Rule. He takes sharp issue with courts that accept the "weighing" test.

This is a well written and well thought through article elaborating the difficulties found in one sentence of the federal rules. Its scholarly approach demands a close study by the reader. Steffen, The Prima Facie Case in Non-Jury Trials, 27 University of Chicago Law Review 94-126.

University of Chicago Press
5750 Ellis Avenue
Chicago 37, Illinois
$2.25 per issue

APPEARANCE BEFORE AN ADMINISTRATIVE AGENCY

Trial lawyers called upon by their clients to represent them before an administrative agency often find themselves in "an other world." Techniques and approaches that work well in the court room become near-failures before the agency. Judge E. Barrett Prettyman (U. S. Circuit Judge, Chief Judge of the District of Columbia Circuit) has written an article that trial

lawyers should read before venturing into an administrative agency hearing.

Emphasizing the need for the production of a letter-perfect written record, the article also deals with the use of a trial memorandum. In two pages the author outlines seven steps to be followed in preparing the memorandum. He then deals with each step of the appearance, beginning with the prehearing conference and ending with the closing argument and the brief. Perhaps the greatest value of this article lies in the frank and practical manner in which it deals with the expert witness and with documentary evidence. Both, of course, play a large part in any administrative hearing. How should the direct testimony of the expert proceed? Is there a better way to get his conclusions than by cumbersome hypothetical questions? When should the opponent's expert be cross-examined? How should documentary evidence be introduced? Can a portion of a larger document (e.g., a resolution from a minute book) be put in the record without loss of possession of the entire document? These, and many more, questions are answered by the author in a clear and concise fashion —together with several suggested questions which the lawyer can ask to accomplish his purposes.

This is a good article for the trial lawyer about to make an infrequent appearance before an agency, and it should form a good check-list for the more sophisticated "administrative - agency lawyer." Prettyman, How to Try a Dispute under Adjudication by an Administrative Agency. 45 Virginia Law Review 179-202. (Also published as part of a book, Prettyman, *Trial by Agency).*

Virginia Law Review
Clark Memorial Hall
Charlottesville, Virginia
$2.50 per back issue

SURVEY OF INSURANCE LAW

Here is a quick way to catch up on the latest cases in the area of insurance. The author (Professor R. W. Dusenberg, New York University School of Law) reviewed the leading recent American cases in this article. His section titles indicate the sweep of coverage: Tort Liability of Insurers; Government Regulation; Standard Fire Policy; Concealment, Misrepresentations, and Warranties; Coverage; Insurable Interest and Measure of Indemnity; and Code Pleading: Effect of subrogation. No attempt will be made here to review each article since they are designed to state cases and to draw no conclusions. Dusenberg, Insurance. 34 New York University Law Review 246-258.

New York University School of Law
Vanderbilt Hall, Washington Sq. So.
New York 3, New York
$2.00 per issue.

AUTOMOBILE COLLISIONS AND THE DEAD MAN'S STATUTE

Consider this case: P and X were the drivers of two automobiles involved in a head-on collision. X died as a result of injuries sustained in the accident. In a suit by P against X's administrator, P attempted to testify that he was driving within local traffic regulations but that X was speeding at nearly 90 miles an hour and veered across the highway into P's automobile. Is this evidence admissible over an objection based on the dead man's statute?

The author (a Texas district judge) begins his analysis of this problem with the frank admission that in his nearly twenty-five years as a judge, he had never before heard the question raised. He concludes that the dead man's statutes *should not* prevent the plaintiff from testifying as to the facts of the collision (either on the basis that they should be strictly construed or because a collision is not a "transaction" within the statute's language), but must admit that several states actually *do* exclude the testimony. In a footnote he lists the following states as excluding the evidence: Illinois, Kentucky, Maine, Minnesota, Missouri, Nebraska, North Carolina, Pennsylvania, Texas, Washington, and Wyoming. However, he also cites cases from these states as being "against the exclusion": Alabama, Arkansas, Delaware, Iowa, Maryland, Michigan, New York, South Dakota, Tennessee, West Virginia, and Wisconsin. He also cites two federal cases applying the latter rule (against exclusion) in Georgia and Florida.

By a simple numerical count, the vote thus far is 13-11 against excluding the evidence. There will, it is prophecied, be much more said on this question and little will be

solved by counting these cases. The problem deserves the attention of the bench and trial bar of this country. A good beginning point is this article. Stout, Should the Dead Man's Statute Apply to Automobile Collisions? 38 Texas Law Review 14-23.

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ARTICLES AND COMMENTS

The titles of additional law review writings are listed below for the lawyer who may have the specific problem in his office:

Damages

1. Taxation of Damages (Author: Lawrence R. Bloomenthal), 21 Univ. of Pitt. L. Rev. 25-40 (Univ. of Pittsburgh Law Review, 1401 Cathedral of Learning, Pittsburgh 13, Pa.).
2. Moving Expenses in Condemnation Proceedings, 21 Univ. of Pitt. L. Rev. 97-106 (See address above).
3. Is a Wife Entitled to Damages for Loss of Consortium? (Author: Leo H. McKay), 64 Dick. L. Rev. 57-63. (Dickinson School of Law, Carlisle, Pa.).

Evidence

4. Self-Incrimination under Foreign Law (Author: John T. McNaughton), 45 Va. L. Rev. 1299-1321. (Virginia L. Rev., Clark Memorial Hall, Charlottesville, Va.). *Note:* This article is an excellent discussion of the problem posed by this question: does the doctrine of privilege against self-incrimination cover disclosure of conduct which is criminal only under some law (state, federal or foreign) other than the law of the state in which the question is asked? There is a very good citation of cases included in the article, as the "Michigan" and "Orthodox-Federal" views are contrasted and projected to new cases.
5. Scientific Evidence in Traffic Cases—Some Legal Problems (Author: Charles T. McCormick), 4 So. Tex. L. Jour. 193-200. (South Texas Law Journal, Inc., 1600 Louisiana St., Houston 2, Tex.).
6. Discovery of Medical Records, 9 C-ML. Rev. 162-168. (Cleveland-Marshall Law School, 1240 Ontario St., Cleveland 13, Ohio).

Insurance

7. The Place of "Variable Annuities" in Law and Economics (Author: John H. Dorsey), 34 Notre Dame Lawyer 489-509 (Notre Dame Law School, Notre Dame, Ind.) *Note:* The article considers the impact of two 1959 U.S. Supreme Court cases which held that variable annuities are "securities" and not "insurance" within the Securities Act and Investment Company Act.

   This topic is further considered in Federal and State Regulation of the Variable Annuity, 44 Minn. L. Rev. 289-307 (Minnesota Law Rev., Fraser Hall, Minneapolis 14, Minn.).
8. Application of Direct Impact Theory to Windstorm Insurance, 44 Minn. L. Rev.172 - 175. (Casenote discussing *Lipshultz v General Ins. Co. Of America* (Minn. 1959) 96 N. W. 2d 880). (Minnesota Law Review, Fraser Hall, Minneapolis 14, Minn.).

Practice and Procedure

9. Consent Judgments as Collateral Estoppel (Author: Fleming James, Jr.,), 108 Univ. of Pa. L. Rev. 173-193. (Univ. of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia 4, Pa.).
10. Edson R. Sunderland's Contribution to the Field of Civil Procedure (various authors), 58 Mich. L. Rev. 6-54. (Michigan L. Rev., Hutchins Hall, Ann Arbor, Mich.).
11. Priority of Pre-Trial Examination in the Federal Courts—A Comment (Author: Irving Younger), 34 N.Y. Univ. L. Rev. 1271-1276. (New York Univ. School of Law, Vanderbilt Hall, 40 Washington Sq. So., New York, N.Y.)
12. Pre-Trial Discovery of Automobile Liability Insurance, 8 Kan. L. Rev. 138-143. (Casenote discussing *Ruark v Smith* (Del. Sup. Ct., 1959) 147 A. 2d 514, complementing Fournier's article in 27 Insurance Counsel Jour. 122-132). (Univ. of Kan. L. Ref., Green Hall, Lawrence, Kan.).

Torts

13. FELA, Negligence, and Jury Trials—Speculation upon a Scintilla, 11 West. Res. L. Rev. 123-136 (Western Reserve Univ. School of Law, Cleveland 6, Ohio).

14. Assaults by Fellow Employees under the FELA and the Jones Act (Author: John D. Calamari), 28 Ford. L. Rev. 449-462 (Fordham Univ. School of Law, 302 Broadway, New York 7, N. Y.). *Note:* the author also compares employee assaults on third persons.
15. Liability of Vendor of Real Property for Personal Injuries, 44 Minn. L. Rev. 144-150. (Minnesota Law Review, Fraser Hall, Minneapolis 14, Minn.).
16. Assumption of Risk in Automobile Cases (Author: Richard G. Greenwood), 43 Marq. L. Rev. 203-216. (Marquette Univ. Law School, Milwaukee, Wis.).
17. Res Ipsa Loquitur: Danger—Proof of Specific Negligence, 11 Syr. L. Rev. 72-80 (Syracuse Univ. College of Law, White Hall, Syracuse 10, N.Y.).

WRITINGS OF LOCAL INTEREST

Arkansas:

Immunity Doctrine in the South West (Author: Sister Ann Joachim) 4 So. Tex. L. Jour. 232-248. (South Texas Law Journal, Inc., 1600 Louisiana St., Houston 2, Tex.).

California:

The Unavoidable—Accident Instruction, 33 So. Cal. L. Rev. 72-81. (So. Cal. L. Rev., Univ. of So. California, University Park, Los Angeles 7, Cal.).

Illinois:

Critique of the Fellows-Kimbrough Rule (Authors: Leslie H. Vogel and Robert K. Lock), 9 De Paul L. Rev. 19-29 (De Paul University College of Law, 25 E. Jackson Blvd., Chicago 4, Ill.). *Note:* The *Fellows-Kimbrough rule* limits the use of the expert witness in Illinois by stating that he "should not be asked whether or not the facts *did* cause and bring about such condition or malady." The author concludes that the rule should be abandoned in Illinois and and cites cases from over 30 states which agree with this conclusion.

Edson R. Sunderland's Contribution to the Reform of Civil Procedure in Illinois (Author: George Ragland, Jr.), 58 Mich. L. Rev. 27-36 (Michigan L. Rev., Hutchins Hall, Ann Arbor, Mich.).

The Trend Toward Elimination of Governmental Immunity in Illinois, 9 De Paul L. Rev. 39-44. (De Paul Univ. College of Law, 25 E. Jackson Blvd., Chicago 4, Ill.).

Indiana:

Contributory Negligence of Children in Indiana: Capacity and Standard of Care, 34 Ind. L. Jour. 511-520 (Indiana Univ. School of Law, Bloomington, Ind.).

Iowa:

Tort Liability of a County, County Official or County Employee in Iowa, 9 Drake L. Rev. 41-47 (Drake Univ. Law School, Des Moines, Iowa).

Kansas:

Survey of Kansas Law, 8 Kan. L. Rev. 185-392 (Univ. of Kansas L. Rev., Green Hall, Lawrence, Kan.).

—Civil Practice (Authors: William A. Kelly and Earl B. Shurtz), pages 201-221.

—Damages (Author: David Prager), pages 257-264.

—Evidence (Author: Spencer A. Gard), pages 278-287.

—Insurance (Author: Charles H. Oldfather, Jr.,), pages 308-310.

—Torts (Author: Frederick J. Morean), pages 366-388.

Kentucky:

Immunity Doctrine in the South West (Author: Sister Ann Joachim) 4 So. Tex. L. Jour. 232-248. (South Texas Law Journal, Inc., 1600 Louisiana St., Houston 2, Tex.).

Michigan:

Edson R. Sunderland's Role in Michigan Procedure (Author: Jason L. Honigan), 58 Mich. L. Rev. 13-18. (Michigan L. Rev., Hutchins Hall, Ann Arbor, Mich.).

Missouri:

Immunity Doctrine in the South West (Author: Sister Ann Joachim) 4 So. Tex. L. Jour. 232-248. (South Texas Law Journal, Inc., 1600 Louisana St., Houston 2, Tex.).

Recent Missouri Court Decisions, 24 Mo. L. Rev. 421-512. (Univ. of Mo. School of Law, Columbia, Mo.).

—Appellate Practice (Author: Charles V. Garnett), pages 421-424.
—Insurance (Author: Robert E. Seiler), pages 442-444.
—Torts (Author: Glen A. McCleary), pages 476-493.
—Trial Practice (Author: Carl C. Wharton), pages 494-496.

New York:

Survey of New York Law, 34 N. Y. Univ. L. Rev. 1347-1605. (New York Univ. School of Law, Vanderbilt Hall, 40 Washington Sq. So., New York, N. Y.).
—Insurance (Author: William H. Mulligan), pages 1456-1468.
—Evidence (Author: Irving Younger), pages 1594-1605.
—Civil Practice (Author: Herbert Peterfreund), pages 1563-1593.
—Torts and Workmen's Compensation (Authors: John W. Thornton and Harold W. McNiece), pages 1529-1549.
Court of Appeals, 1958 Term, 9 Buff. L. Rev. 37-229. (Univ. of Buffalo School of Law, Buffalo, N. Y.).
—Civil Procedure, pages 54-67.
—Evidence, pages 149-165.
—Insurance, pages 165-170.
—Torts, pages 197-207.

North Carolina:

Survey of North Carolina Case Law, 8 N. Car. L. Rev. 371-477. (North Carolina School of Law, Chapel Hill, N. Car.
—Civil Procedure, pages 382-394.
—Damages, pages 419-422.
—Evidence, pages 429-431.
—Insurance, pages 431-434.
—Torts, pages 455-463.
—Trial and Appellate Practice, pages 463-474.

Ohio:

Contributory Negligence — The Dwindling Defense, 11 West Res. L. Rev. 109-123. (Western Reserve Univ. School of Law, Cleveland 6, Ohio).

Pennsylvania:

1958-59 Survey of Pennsylvania Law, 21 Univ. of Pitt. L. Rev. 151-423. (Univ. of Pittsburgh L. Rev., 1401 Cathedral of Learning, Pittsburgh 13, Pa.).
—Torts (Author: Herbert L. Sherman, Jr.), pages 345-357.
—Civil Procedure (Author: Clare B. McDermott, Jr.), pages 383-412.
—Evidence (Author: Jack W. Plowman), pages 421-423.

Tennessee:

Immunity Doctrine in the South West (Author: Sister Ann Joachim) 4 So. Tex. L. Journ. 232-248. (South Texas Law Journal, Inc. 1600 Louisiana St., Houston 2, Tex.).
1959 Tennessee Survey, 12 Vand. L. Rev. 1057-1376. (Vanderbilt School of Law, Nashville 5, Tenn.).
—Insurance (Author: William R. Anderson), pages 1213-1230.
—Procedure and Evidence (Author: Edmund M. Morgan), pages 1281-1317.
—Torts (Author: Dix W. Noel), pages 1350-1376.

Texas:

Immunity Doctrine in the South West (Author: Sister Ann Joachim) 4 So. Tex. L. Journ. 232-248. (South Texas Law Journal, Inc., 1600 Louisiana St., Houston 2, Tex.).
The Spanish Influence on the Texas Law of Civil Procedure (Author: Joseph Webb McKnight), 38 Tex. L. Rev. 24-54. (Univ. of Texas School of Law, Austin, Texas).

Virginia:

Annual Survey of Virginia Law, 45 Va. L. Rev. 1252-1298, 1402-1481 (two issues). (Virginia L. Rev., Clark Memorial Hall, Charlottesville, Va.).
—Pleading and Practice (Author: T. Mumford Boyd), pages 1436-1451.
—Torts (Author: William T. Muse), pages 1464-1476.
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Automobile Guest Laws Today

REPORT OF THE AUTOMOBILE INSURANCE COMMITTEE—1960

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There are thirty states which by statute or court decision limit the liability of the owner or operator of a motor vehicle to a guest. We have not included the states of Alaska and Hawaii in our survey. The principal purpose of this paper is to furnish all members of our Association and subscribers to the Journal with a brief summary of the guest statute or court decision, together with an analysis of court decisions interpreting (1) who is a guest?, (2) what is required to impose liability on the owner or driver?, and (3) guest's conduct as a defense available to owner or driver. Ordinary negligence of the owner or driver prevails in those states that are not listed in the following summary.

PART I

Summary of Automobile Guest Laws or Decisions

State	Circumstances Rendering Owner or Driver Liable to Guest	Statute
Alabama	Wilful or wanton misconduct.	Ala.Code,1940 (Tit.36,Sec. 95)
Arkansas	Wilful and wanton operation in disregard of the rights of others. (Self-invited guest or guest at suffrance.)	Statutes, 1947 (Secs.75-913, 75-914)
	Wilful misconduct. (Non-paying guest)	Statutes, 1947 (Sec.75-915)
California	Intoxication or wilful misconduct.	Vehicle Code (Sec.403)
Colorado	Intentional accident, intoxication, or wilful and wanton disregard of the rights of others.	Colo. Statutes Annotated, 1953 (Sec.13-9-1)
Delaware	Intentional accident, or wilful or wanton disregard of the rights of others.	Del. Code Annotated (Title 21, Sec. 6101)
Florida	Gross negligence or wilful and wanton misconduct.	Fla. Statutes, 1955 (Sec. 320.59)
Georgia	No statutory provisions, but liability to guest is restricted to gross negligence by decision.	

State	Circumstances Rendering Owner or Driver Liable to Guest	Statute
Idaho	Intentional accident, intoxication, or reckless disregard of the rights of others.	Idaho Code (Secs.49-1401, 1402)
Illinois	Wilful and wanton misconduct.	Ill. Rev. Statutes, 1957, (Chap. 95½, Sec.9-201)
Indiana	Wanton or wilful misconduct.	Burns Ind. Statutes (Secs. 47-1021, 1022)
Iowa	Driver under influence of intoxicating liquor or because of his reckless operation.	Code of Iowa, 1954 (Sec. 321.494)
Kansas	Gross and wanton negligence.	General Statutes of Kansas (Sec.8-122 (b))
Massachusetts	No statutory provisions, but liability to guest restricted to gross negligence by decision.	
Michigan	Gross negligence or wilful and wanton misconduct.	Compiled Laws, 1948 and Mason's 1956 Supp. (Sec. 257.401)
Montana	Gross negligence and reckless operation.	Rev. Codes of Mont., 1947 (Secs. 32-1113 to 32-1116)
Nebraska	Intoxication or gross negligence.	Rev. Statutes of Neb., 1943, (Secs. 39-740)
Nevada	Intoxication, wilful misconduct or gross negligence.	Nev. Rev. Statutes (Sec. 41.180)
New Jersey	Generally speaking, lack of reasonable care prevails. However, by court decision the duty of the operator of a vehicle toward a person riding therein as a trespasser or a mere licensee is only to abstain from acts wilfully injurious.	
New Mexico	Intentional accident or heedlessness or reckless disregard of the rights of others.	N. M. Statutes, 1953, (Secs. 64-24-1, 2)
North Dakota	Intoxication, wilful misconduct or gross negligence.	Rev. Code, 1943 (Secs.39-1501 to 39-1503)
Ohio	Wilful or wanton misconduct.	Ohio Rev. Code (Sec. 4515.02)
Oregon	Intentional accident, gross negligence or intoxication.	Oregon Rev. Statutes (Sec. 30.110)
South Carolina	Intentional accident, heedlessness or reckless disregard of the rights of others.	Code of Laws of S. C., 1952 (Sec.46-801)
South Dakota	Wilful and wanton misconduct.	Code of 1939 and Supp. (Sec.44.0362)
Texas	Intentional accident, heedlessness or reckless disregard of the rights of others.	Vernon's Texas Statutes (Art. 6701 b)
Utah	Intoxication or wilful misconduct.	Utah Code Annotated, 1953 (Secs. 41-9-1, 41-9-2)

State	Circumstances Rendering Owner or Driver Liable to Guest	Statute
Vermont	He has received or contracted to receive pay for the carriage of such occupant, or injuries are caused by the gross or wilful negligence of the operator.	Vermont Statutes, 1959 (Tit.23, Sec.1491)
Virginia	Gross negligence, or wilful and wanton disregard of the safety of the person.	Code of Virginia, 1950 (Sec.8-646.1)
Washington	Intentional accident, gross negligence or intoxication. Proof of cause of action must be corroborated by competent evidence or testimony independent of, or in addition to, testimony of parties to action.	Rev. Code, (Sec.46.08.080, as amended)
Wyoming	Gross negligence or wilful and wanton misconduct.	Wyoming Compiled Statutes, 1945 (Sec.60-1201)

PART II

Who Is A Guest?

ALABAMA

Title 36, Section 95, Code of Alabama, 1940, provides that the owner, operator or person responsible for the operation of a motor vehicle shall be liable for injuries or death caused by wilful or wanton misconduct "of a guest while being transported without payment, therefor in or upon said motor vehicle".

The term "guest" is defined only by judicial construction. The decisions hold a "guest" to be one carried gratuitously; a "passenger" is one transported for hire or reward. *Sullivan v. Davis,* 263 Ala.685, 83 So. 2d 434; *Wagnon v. Patterson,* 260 Ala. 207, 70 So. 2d 244.

There must be an intention of the rider in and the driver of the motor vehicle to create the status of "passenger". The sharing of the cost of operating the automobile does not transform into a paying "passenger" one who without the exchange would be a "guest". *Wagnon v. Patterson, supra.* If the excursion is not social *any* benefit to the driver or a mutual benefit to the driver and the person carried is sufficient to create the status of "passenger". *Blair v. Green,* 247 Ala. 104, 22 So. 2d 834. A practical nurse being carried to see the driver's wife in reference to hiring the nurse is that of prospective employer and employee, making the nurse a "passenger" rather than a "guest". *Sullivan v. Davis, supra.*

ARKANSAS

Arkansas has, in effect, two Guest Statutes. The first, Act 61 of 1935 (Secs. 75-913 and 75-914 Ark. Stats.), applies to all persons transported as guests, with the term "guest" defined as a "self-invited guest or guest at sufferance." The latter definition has been held to include invited guests. *Ward v. George,* 195 Ark. 216, 112 S.W.2d 30.

The second statute, Act 179 of 1935 (Sec. 75-915 Ark. Stats.), applies to persons transported as guests "without payment for such transportation" and to certain named relatives of the owner or operator of a motor vehicle while in, entering or leaving such motor vehicle. Insofar as the statute relates to the named relatives, it has been held unconstitutional. *Emberson v. Buffington,* 228 Ark. 120, 306 S.W.2d 326. The statute does apply to persons not on a public highway. *Banko v. Garvin,* Ark., 318 S. W.2d 611.

Whether a passenger is a guest is determined by whether there is any mutual benefit. *Arkansas Valley Coop Rural Electric Co. v. Elkins,* 200 Ark. 883, 141 S.W.2d 538; *Payne v. Fayetteville Mercantile Company,* 202 Ark. 274, 150 S.W.2d 966. Whether or not there is such benefit is often a question of fact for the jury. *Brand v. Rorke,* 225 Ark. 309, 280 S.W.2d 906; *Whit-*

tecar v. Cheatham, 226 Ark. 31, 287 S.W.2d 578.

Where there is no possible benefit, a person's status as a guest may be determined as a matter of law. *Froman v. J. R. Kelley Stove & Heating Co.,* 196 Ark. 808, 120 S. W.2d 164; *Tilghman v. Rightor,* 211 Ark. 229, 199 S.W.2d 943.

Whether the relationship of guests terminates when the passenger alights from the car is a question for the jury not necessarily determined by the intention to continue the trip. *Rogers v. Lawrence,* 227 Ark. 117, 296 S.W.2d 899.

CALIFORNIA

There is no fixed law as to what constitutes a "guest". It was held in *Benjamin v. Rutherford,* 146 Cal. App. 2d 561, 303 P. 2d 1079, that the question is one of fact for the jury.

The primary rule seems to be that expressed in *Whitemore v. French,* 37 Cal. 2d 744, 235 P. 2d 3, where the supreme court said:

> "Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence."

And in the recent case of *Gillespie v. Rawlings,* 49 Cal. 2d 359, 317 P. 2d 601, the court held that where a real estate broker asked her receptionist to accompany her on a Sunday drive for the principal purpose of enabling the receptionist to familiarize herself with real estate activity in a certain area, the advantage which would inure to the broker made the receptionist a passenger to whom the broker was liable for ordinary negligence.

However, *McCann v. Hoffman,* 9 Cal. 2d 279, 70 P. 2d 909, appears to have set the rule to be that where the main purpose of the trip is a joint pleasure of the participants, the payment of a portion of the expense does not constitute the moving influence for the transportation and the participants are guests rather than passengers.

COLORADO

The guest statute was enacted to prevent recovery by those who have no moral right to recompense, those carried for their own business or pleasure, *Dobbs v. Sugiaka,* 117 Colo. 218, 185 P. 2d 784. Thus, a hitchhiker is a guest, *Morrow v. Whitley,* 125 Colo. 392, 244 P.2d 657; members of school organization carried by parents of other members are guests, *Klotka v. Barker,* 124 Colo. 588, 239 P. 2d 607.

Under *Klotka v. Barker, supra,* a benefit conferred upon an owner must be a sufficiently real and tangible one and serve as the inducing cause for the transportation to take the passenger out of the guest statute. Thus, a member of a high school band being transported by another member's parent was a guest, although the parent testified he furnished the transportation as a community service and thus was rewarded by his personal satisfaction.

An allegation that one is riding as a passenger does not acknowledge that one is being transported under the guest statute and it is not necessary to plead that one was a passenger for hire, if this is shown. *Houghtaling v. Davis,* Colo., 344 P. 2d 176.

DELAWARE

A "guest" is one who rides in an automobile driven by another, merely for his own pleasure or on his own business, and without making any return or conferring any benefit on the driver. *Elliott v. Camper,* 38 Del. 504,194 Atl. 130.

Where it is agreed in advance that occupants shall contribute to the cost of operating the vehicle, such occupants are not "guests". *Wilkes v. Melice,* 48 Del. 206, 100 A. 2d 742.

Direct payment is not essential to remove the rider from the operation of the "guest" statute, but reasonable expectation that some benefit will accrue to the driver is sufficient. *Engle v. Poland,* 47 Del. 365, 91 A. 2d 326.

A "public carrier", or "any owner or operator of a motor vehicle while the vehicle is being demonstrated to a prospective purchaser" may not enjoy the protection of the "guest" statute (21 Del. C. Sec. 6101 (b)). It should be noted, however, that this express statutory exclusion is by way of example only. *Robb v. Ramey Associates,* 40 Del. 520, 14 A. 2d 394.

FLORIDA

A guest is generally limited to "passengers or riders who are being carried gratuitously." *Sullivan v. Stock,* Fla., 98 So. 2d 507; *Perry v. Mershon,* 149 Fla. 351, 5 So. 2d 694.

The statute does not apply if the "motivating purpose" is for the mutual benefit of both the driver and passenger or for the sole benefit of the driver. *Sproule v. Nelson*, Fla., 81 So. 2d 478; *Sullivan v. Stock*, Fla., 98 So. 2d 507 . . . or as to fellow employees on the same business trip, or if in a "commercial transaction", *Sproule v. Nelson, supra*, and *Miller v. Morse Auto Rentals*, Fla., 106 So. 2d 204.

A person may not become a "paying passenger" merely by making, or offering to make, contributions to the expenses of the trip. *McDougald v. Couey*, 150 Fla. 748, 9 So. 2d 187; *Yokom v. Rodriguez*, Fla., 41 So. 2d 446.

The statute itself has an exemption for "school children or other students being transported to or from schools or places of learning" but this proviso does not apply to extra-curricular school activities, e.g., returning from a basketball game. *Farrey v. Bettendorf*, Fla., 96 So. 2d 889.

Persons outside the automobile may still be guests. For example, the plaintiff was held to be a guest while outside the automobile opening a gate when the automobile struck him. *Fishback v. Yale*, Fla., 85 So. 2d 142; and when he had his hand on the door preparatory to getting in and the driver backed up, *Kaplan v. Taub*, Fla., 104 So. 2d 882; same situation, alighting, *LaRue v. Hoffman*, Fla., 109 So. 2d 373.

Timely protest and unheeded demands to be let out may change the status of the plaintiff from that of a voluntary passenger to an involuntary one, making ordinary negligence suffice. *Andrews v. Kirk*, Fla., 106 So. 2d 110.

GEORGIA

A person who is an invited guest and a gratuitous passenger must establish gross negligence. *Epps v. Parrish*, 26 Ga. App. 399, 106 S.E. 297; *Holtsinger v. Scarbrough*, 69 Ga. App. 117, 24 S.E.2d 869; *Nash v. Reed*, 81 Ga. App. 473, 59 S.E. 2d 259.

A guest who rides for the purpose of conferring some substantial benefit upon the host other than the pleasure of the guest's company may recover for negligence rather than gross negligence. *McBee v. Williamson*, 93 Ga. App. 859, 101 S.E. 2d 910.

IDAHO

The Idaho law regarding liability of an automobile owner to a guest does not attempt a statutory definition of the word "guest" further than to absolve the owner or operator of a motor vehicle from liability for damages to "his guest without payment" except in stated circumstances. Idaho Code (Sec. 49-1401).

Interpreting the statute, the Idaho courts hold that share-the-ride arrangements, where each participant drives his automobile for alternate periods, make each party a "passenger" rather than a "guest" when riding in the other's automobile. *Riggs v. Roberts*, 74 Idaho 473, 264 P. 2d 698. A rather confusing decision by the supreme court holds that the guest statute has no application where the operator and passenger are acting in the scope of their common employment, reasoning that the transportation in this instance is designed for the mutual benefit of both parties and the employer. *Buffatt v. Schnuckle*, 79 Idaho 314, 316 P. 2d 887.

One who pays for a part of his host's gas or oil is not necessarily a "passenger" as opposed to a "guest". For example, contributions just as a matter of courtesy would not constitute "payment" within the statute. *Riggs v. Roberts, supra.*

ILLINOIS

Illinois cases define "guest", as used in the statute, as one who is invited either directly or by implication to enjoy the hospitality of the driver of a motor vehicle and who accepts such hospitality and takes a ride either for his own pleasure, or on his own business, without making any return to, or conferring any benefit upon, the driver of the motor vehicle other than the mere pleasure of his company. *Miller v. Miller*, 395 Ill. App. 273, 69 N.E. 2d 878. Slight benefit to the host such as it is customary to extend as part of the ordinary courtesies of the road do not remove an individual from the status of a guest. *Perrine v. Charles T. Bish and Son*, 346 Ill. App. 321, 105 N. E. 2d 543. However, monetary consideration paid is not the sole test, and all facts and circumstances involved, including social and business aspects of the trip, the mutual interests of both parties, the motivating influence for furnishing the transportation, and the economic benefit to the operator or owner should be considered. *Dirksmeyer v. Barnes*, 2 Ill. App. 2d 496, 119 N.E. 2d 813. The relation of host and guest begins when guest attempts to enter and ends when he has safely alighted at end of ride. *Tallios*

v. Tallios, 350 Ill. App. 299, 112 N. E. 2d 723.

In addition to "guests" the statute specifically applies to an individual "while engaged in a joint enterprise with the owner or driver of such motor vehicle or motorcycle. Ill. Rev. Statutes, 1957 (Chap. 95½ Sec.9-201).

INDIANA

The statute does not define the word "guest". It provides that the owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of "a guest, while being transported without payment therefor, in or upon such motor vehicle" unless "wanton or wilful misconduct" is proved. Burns Indiana Statutes Annotated, Sec. 47-1021. A common carrier or an owner or operator demonstrating a vehicle to a prospective purchaser is not relieved by the statute from liability to a passenger. Burns Ind. Stat. Ann., Sec. 47-1022.

The word "guest" in the statute has more of social than business significance and if a trip is primarily social, incidental benefits, though monetary, do not exclude a guest relationship. *Kemper v. Mardis,* 123 Ind. App. 546, 111 N.E. 2d 77; *Lawson v. Cole,* 124 Ind. App. 89, 115 N.E. 2d 134; *Albert McGann Securities Co. v. Coen,* 114 Ind. App. 60, 48 N.E. 2d 58. But a passenger is not a guest if he pays a valuable consideration for the ride. In *Kemper v. Mardis, supra,* a jury verdict was upheld, though no "wanton or wilful misconduct" was shown, the passenger having agreed to pay the expense of gas and oil in traveling to and from work. Similarly, the evidence was sufficient to support a finding of a business relationship in *Lawson v. Cole, supra,* it appearing that the passengers and the host, visiting relatives in different parts of the same state, had agreed that the passengers would pay for oil, gas and food. In *Ott v. Perrin,* 116 Ind. App. 315, 63 N.E. 2d 163, a passenger was held not a guest where he and the host had an arrangement for sharing rides to and from work on account of the gasoline shortage. It was held in *Liberty Mutual Insurance Co. v. Stitzle,* 220 Ind. 180,41 N.E. 2d 133, that expectation of material gain rather than social companionship must have motivated the owner in inviting another person to ride in order to exclude the guest relationship. An issue was raised on that question, the court held, where the passenger was an interior decorator on a trip with the host to aid the latter in selecting furniture to be sold to her by the store. Where, however, the sole purpose of the trip was social, as to play a game of roque, the passenger was held to be a guest. *Swinney v. Roler,* 113 Ind. App. 315, 63 N.E. 2d 163. And where a trip is taken for pleasure or social purposes, it has been held that the sharing of expense of gas and oil by the passenger does not constitute "payment for transportation" under the guest statute. *Albert McGann Securities Co. v. Coen, supra.*

It was held in *Fuller v. Thrum,* 109 Ind. App. 407, 31 N.E. 2d 670, that a six year old child was conclusively presumed to be non sui juris and therefore legally incapable of accepting an invitation to ride as a "guest".

IOWA

The Iowa guest statute, Code of Iowa, 1954 (Sec.321.494) reads, "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle."

Under the guest statute, although a relation of guest cannot be forced upon one, a "guest" under such a statute may be a person riding either by invitation or by permission. Hence, an infant was a "guest" notwithstanding the fact the infant might have been incapable of accepting an invitation to ride, *Horst v. Holtzen,* 249 Iowa 958, 90 N.W. 2d 41.

Thus, the occupant of an automobile is neither a "guest" nor an "invitee" when he is riding therein for the mutual and tangible benefit of the owner, driver on one hand and of the occupant on the other hand. Where the only benefits conferred on a person extending an invitation to another to ride in the automobile are those incidental to society, hospitality and companionship, the passenger is a "guest" but where the passenger is a social guest or casual invitee he is such a guest even though he may contribute something toward expenses of the journey and may be expected to operate the automobile on part of the trip. *Doherty v. Edwards,* 227 Iowa 1264, 290 N.W. 672. Mere division of

expenses among members of a party riding in an automobile does not render the person so contributing a "passenger for hire". *McCormack v. Pickrell,* 225 Iowa 1076, 283 N.W. 899. Accompanying a driver to look for a lost fender skirt does not remove such a person from the status of a "guest". *McBride v. Dexter,* Iowa, 92 N.W. 2d 443.

KANSAS

The Kansas guest statute is G.S. 1949, 8-122b which reads: "That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle." From this statute we may deduce a guest to be a person who is transported by the owner or operator of a motor vehicle without payment for such transportation.

The decisions have had some problem of what may or may not constitute payment. Where the driver receives compensation the passenger is not a guest. *Elliot v. Behner,* 146 Kan. 827, 830, 73 P. 2d 1116.

But it has been held that "payment" for transportation sufficient to preclude classification as a guest must constitute a benefit or advanage which is motivating in character and not merely incidental in character. *Srajer v. Schwartzman,* 164 Kan. 241, 242, 188 P. 2d 971; *Pilcher v. Erny,* 155 Kan. 257, 258, 260; 146 P. 2d 111.

Conversely where the motivating reason for being in the car was not the payment such a passenger was held a "guest". *Vogrin v. Bigger,* 159 Kan. 271, 272, 279, 154 P. 2d 111.

Payment of expenses on a social and mutual pleasure trip is not "payment for such transportation". *Bedenbender v. Walls,* 177 Kan. 531, 532, 535, 280 P. 2d 630.

A party to a "share a ride" agreement was a passenger and not a "guest". *Sparks v. Getz,* 170 Kan. 287, 288, 290, 225 P. 2d 106. But a child in the unrestricted care and custody of the party transporting him was held a guest. *In Re Estate of Wright,* 170 Kan. 600, 602, 604, 606, 608, 609, 228 P. 2d 911.

It was held a pupil being transported to an athletic contest was not a guest. *Kitzel v. Atkeson,* 173 Kan. 198, 200, 201, 245 P. 2d 170. Plaintiff accompanying defendant's mechanic on a "road test" was not a "guest" within the statute, *Thomas v. Hughes,* 177 Kan. 347, 348, 279 P. 2d 286.

MASSACHUSETTS

For insurance purposes, it is important to remember that the Compulsory Automobile Insurance Law does not cover guests. If the owner wishes to cover his liability to his guests he must purchase "guest coverage".

A guest occupant is defined as "any person, other than an employee of the owner or registrant of a motor vehicle or of a person responsible for its operation with the owner's or registrant's express or implied consent, being in or upon, entering or leaving the same, except a passenger for hire in the case of a motor vehicle registered as a taxi cab or otherwise for carrying passengers for hire." M.G.L.A.c 90 Sec.34A.

The decisions follow the statutory law with considerable exactness. Thus a trespasser is a guest occupant, *Westgate v. Century Indemnity Co.,* 309 Mass. 412, 35 N.E. 2d 218; a person outside the automobile may still be a guest, *Ruel v. Langelier,* 299 Mass. 240, 12 N.E.2d 735; *Donahue v. Kelly,* 306 Mass. 511, 29 N.E.2d 10, *Bragdon v. Dinsmore,* 312 Mass. 628, 45 N.E.2d 833; *Adams v. Baker,* 317 Mass. 748, 59 N.E.2d 701.

MICHIGAN

The statute provides: "No person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator *** unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator."

A person outside the automobile may still be a guest. Where defendant stopped to examine a tire and plaintiff passenger alighted and when stepping back into the car, the car moved and she was injured, plaintiff was held to be a guest. *Castle v. McKeown,* 227 Mich. 518, 42 N.W.2d 733. See also *Langford v. Rogers,* 278 Mich. 310, 270 N.W. 692 (riding a towed toboggan). But where plaintiff alighted from the car, closed the door and took one or two steps, then was struck by the rear fender when the car skidded sideways as it started, plaintiff was not a guest. *Brown v. Arnold,* 303 Mich. 616, 6 N.W. 2d 914. See also *Hunter v. Baldwin,* 268 Mich. 106, 255 N.W.

431 (cranking car); *Ravey v. Healy*, 279 Mich. 293, 272 N.W. 692 (on running board).

Since the guest statute relieves owners and operators from liability to guest for ordinary negligence, it is in derogation of common law and is strictly construed in favor of the guest. *Hunter v. Baldwin, supra.* The word "guest" connotes a social undertaking, and a host-guest relationship is not created by a trip related to the business of the driver, *Anderson v. Conterio*, 303 Mich.75, 5 N.W. 2d 592; nor by a trip at the convenience of the driver, *Hall v. Kimball*, 355 Mich. 333, 94 N.W. 2d 817; nor by a trip at the convenience of a third person, *Peronto v. Cootware*, 281 Mich. 664, 274 N.W. 724.

A passenger may be a guest even though he shares the expenses, *Bushouse v. Brom*, 297 Mich. 616, 298 N.W. 303; *Morgan v. Tourangeau*, 259 Mich. 598, 244 N.W. 173; or shares in the driving, *In Re Harper's Estate*, 294 Mich. 453, 293 N.W.715; or both, *Brody v. Harris*, 308 Mich. 234, 13 N.W. 2d 273.

Depending upon whether or not it is the inducement for the transportation, the payment of money for a particular trip can be consistent with a host-guest relationship, *Shumaker v. Kline*, 333 Mich. 346, 53 N.W.2d 295 ($1.00 for 23 miles); *Dutcher v. Rees*, 331 Mich. 215, 49 N.W. 2d 146 ($1.00 for 3 miles); or may create a passenger for hire situation, *Pence v. Deaton*, 353 Mich. 547, 93 N.W. 2d 246 ($2.50 for 12 miles); *Weeks v. Hyatt*, 346 Mich. 479, 78 N.W. 2d 260 ($5.00 for 140 miles).

Rotation car pools have been decided both ways, *Everett v. Burg*, 301 Mich. 734, 4 N.W. 2d 63 (guest); *Bond v. Sharp*, 325 Mich. 460, 39 N.W. 2d 37 (non-guest); but the latest cases indicate that despite the social element, the arrangement is primarily financial, and riders are passengers for hire, *Collins v. Rydman*, 344 Mich. 488, 74 N.W. 2d 900.

MONTANA

The Montana statute states in part "* * any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire * *". Rev. Codes of Mont. 1947, Sec. 31-1113. Passengers on a public carrier or a passenger who is a prospective purchaser of a motor vehicle which is being demonstrated to him are expected. Rev. Codes of Mont. 1947, Sec. 32-1116.

Where an owner of a truck and his passengers were engaged in rescue mission during a flood and the owner was not paid nor getting any personal benefit passenger who went on mission of his own accord was guest within the meaning of the statute. *Watkins v. Williamson*, 132 Mont. 446; 314 P. 2d 872, 875.

The New York courts have held that, where plaintiff shared expenses and defendant donated auto, plaintiff was not a guest within the meaning of the Montana statute, stating it applied to gratuitous passengers and invitees who were not passengers for hire and did not apply to every passenger who was not a passenger for hire. *Smith v. Clute*, 277 N.Y. 407, 14 N.E. 2d 455; reh den 278 N. Y. 598, 16 N.E. 2d 118. The federal courts have held that where the plaintiff showed that she accepted an invitation for a trip and agreed to pay $1.50 a day as her part of the expenses and where there was no evidence of actual costs of meals, etc. or that any part of the sum to be paid was to be applied to the cost of gas and oil, plaintiff was a guest. *Copp v. Van Hise*, 119 F.2d 691, 694.

NEBRASKA

A guest occupant is defined as "a person who accepts a ride in any motor vehicle without giving compensation therefor." Neb. Rev. Stat., Sec. 39-740 (Reissue 1952). The definition of guest depends upon the facts of each case and compensation means that which constitutes or is regarded as an equivalent or recompense and is not limited to cash or its equivalent. *Van Auker v. Steckley's Hybrid Corn Company*, 143 Neb. 24, 8 N.W. 2d 451.

A person riding in a motor vehicle is a guest if his carriage confers benefit upon himself and no benefit upon the owner or operator. *Eilts v. Bendt*, 162 Neb. 538, 76 N. W. 2d 623. The benefit to the operator must be a tangible and substantial one to the owner and the motivating influence for his furnishing the transportation to remove an occupant from the status of guest. *Born v. The Estate of Matzner*, 159 Neb. 169, 65 N. W. 2d 593.

NEVADA

There are very few cases in Nevada covering this point. Of interest is the case of *Cook v. Faria*, 73 Nev. 295, 318 P. 2d 649, in which the Nevada Supreme Court held: "That where an automobile owner and

driver was making a trip from California to Idaho for the purposes of hunting and was relying upon the automobile passenger to insure the success of the trip, since the automobile owner was not an experienced hunter and passenger was an experienced hunter with knowledge of the country and as to where deer might be found and by what roads the deer country could be reached, the presence of the passenger and the husband in the automobile constituted compensation for the ride and the passenger was not a guest within the meaning of the Nevada statute."

A judgment for the passenger was affirmed but a re-hearing granted February 14, 1958, the result of which has not been ascertained.

NEW JERSEY

New Jersey does not have a so-called guest statute which denies a cause of action to a guest in an automobile who is injured by the ordinary negligence of his host. By decision, however, the courts have evolved a somewhat analogous rule which rests upon the distinction whether the host "invites" the rider who thus becomes an "invitee", or the rider invites himself in which case he is a mere "licensee" The supreme court was recently asked to set this distinction aside — the facts in the particular case being unusually compelling — but the court refused, holding that a change of such magnitude was for the legislature rather than for the courts to accomplish. *Lippman v. Ostrum,* 22 N.J. 14, 123 A. 2d 230.

There is, however, in New Jersey, a statute entitled *"Unsatisfied Claim and Judgment Fund Law",* N.J. R.S. 39:6-61, etc., enacted in 1952, the primary object of which is to provide a measure of relief for persons who sustain an injury inflicted by financially irresponsible or unidentified owners or operators of motor vehicles where such persons would otherwise be remediless. *Corrigan v. Gassert,* 27 N. J., 227, 142 A. 2d 209.

One of the sections of the foregoing statute, N. J. R. S. 39:6-70 (c) specifically excludes from the benefits of the statute any person who at the time of the accident was a "guest-occupant" riding in a motor vehicle owned or operated by the judgment debtor * * * *".

A "guest occupant" under the above statute is a person who is riding gratuitously in a motor vehicle owned or operated by the judgment debtor upon his invitation, express or implied, or with his permission and acquiesence. *Casey v. Cuff,* 46 N. J. Super. 33, 133 A. 2d 659.

A person who makes an arrangement to assist the operator of a truck in the delivery of tires in exchange for the operator's agreement to assist him in certain work around the helper's house is *not* a "guest occupant" but rather a "passenger" entitled to the benefits of the act. *Moss v. Govan,* 52 N.J. Super. 550, 146 A. 2d 227.

NEW MEXICO

Although the statute does not define "guest", it does speak of "guest without payment". Sec. 64-21-1, N.M. Statutes, 1953. Apparently, nonpayment by the passenger is the controlling element. The second section of the act (Sec. 64-24-2, N. M. Statutes, 1953) excludes from its protection "a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to a prospective purchaser * * *". It appears that a public carrier is fully responsible even to nonpaying passengers and that only one class of nonpaying business guest, i.e., a prospective purchaser is outside the operation of the act. The determination of guest status has not been in issue in any of the cases arising out of the act decided by the New Mexico Supreme Court.

In one case the court approved without pertinent opinion a lower court's finding that two brothers, injured while a third brother was driving, were not within the meaning of the guest statute. They were driving in shifts enroute home and were found to be "engaged in a joint venture for a family purpose". The decision of the lower court is not reported. *Perini v. Perini,* 64 N.M. 79, 324 P. 2d 779,780.

NORTH DAKOTA

A guest occupant is defined to "include a person who accepts a ride in any vehicle without giving compensation therefor." Section 39-1501, N.D.R.C. 1943.

Who is a guest is largely a question for determination in each individual case upon the peculiar facts thereof. *Jacobs v. Nelson,* 67 N.D. 27, 268 N.W. 873.

The status of a guest is not changed by reason of the fact that he does part of the driving or gives compensation for the ride if such is incidental to hospitality and companionship and such compensation does

not confer a substantial benefit on the owner, driver or person responsible for the operation of the motor vehicle. *Ledford v. Klein*, N.D., 87 N. W. 2d 345.

An invited guest is not a passenger either in the legal sense of the word or in the ordinary sense in which that term is commonly and ordinarily understood. *Bentley v. Oldetyme*, 71 N. D. 52, 298 N.W. 417.

OHIO

The formula for differentiating between a "guest" and a "passenger" is stated as follows: "Where, in the carrying of a rider, a motor vehicle's direct operation tends to promote the mutual interests of both the rider and driver, thus creating a joint business relationship between them, or where the rider accompanies the driver at the instance of the latter for the purpose of having the rider render a benefit or service to the driver on a trip which is primarily for the attainment of some objective of the driver, the rider is a "passenger" and not a "guest"; but if the carriage confers a benefit only on the rider and no benefit other than such as is incidental to hospitality, good will or the like is conferred on the driver, the rider is a "guest". *Hasbrook v. Wingate*, 152 O.S. 50, 87 N.E. 2d 87; *O'Rourke v. Gunsley*, 154 O.S. 375; 96 N.E. 2d 1.

It has been held that notwithstanding a payment of a share of the expenses of the trip by the rider to the driver, the rider is still a guest if the purpose of the trip is for "mutual pleasure or social purposes, without any business aspect". *Duncan v. Hutchinson*, 139 O.S. 185, 39 N.E. 2d 140. And an offer to pay for gasoline is insufficient to create the status of passenger unless it formed the basis of such a contractual arrangement as would give the owner or driver a right to recover on the rider's offer in an action at law. *Birmelin v. Gist*, 162 O. S. 98, 120 N.E. 2d 711. However, the supreme court has recently allowed a motion to certify a case in which there was an agreement for sharing of the expense on a cross-country trip. *Jancar v. Knapic*, No. 36170, Supreme Court of Ohio.

The rider has been held a passenger where: he accompanied the driver for purpose of giving the driver directions, *Dorn v. North Olmstead*, 133 O.S. 375, 14 N.E. 2d 11; he is a co-employee of the driver, *Morrow v. Hume*, 131 O.S. 319, 3 N.E. 2d 39; a prospective customer of the driver, *Rotham v. Metropolitan Casualty Company*, 134 O.S. 241, 16 N.E. 2d 417; an employee of the driver on employer's business, *Bailey v. Neale*, 63 O.App.62, 25 N.E. 2d 310; a member of a share the ride car pool, *Miller v. Fairley*, 141 O.S. 327; 48 N.E. 2d 217; even a child whose parents formed a car pool for transportation to and from school, *Lisner v. Faust*, 168 O.S. 346, 155 N.E. 2d 59; a sister accompanying her brother to try to effect a reconciliation between the brother and his wife, *Zaso v. DeCola*, 72 O. App. 297, 51 N.E. 2d 654; a farmer who exchanged work with a neighbor, *Pheiffer v. Pennsylvania Railroad*, 60 O.L.A. 24, 186 F. 2d 558; a boy scout helping assistant scout master gather paper for a troop paper sale, *Vest v. Kramer*, 158 O. S. 78, 107 N.E. 2d 105. But in *Ames v. Seibert*, 156 O.S. 45, 99 N.E. 2d 905, a garageman who was going to assist the driver in tearing down the driver's car upon a promise of a ride home was held a guest as "there does not arise a contract express or implied that such transportation is on the basis of payment". And the rider was held to be a guest where the purpose of the trip was to get coffee for both the rider and the driver, even though the driver needed a licensed driver with him and the rider was licensed. *Sabo v. Marn*, 103 O. App. 113, 144 N.E.2d 248.

A rider may be a guest though mentally incompetent to accept an invitation to ride as a guest—i.e., an intoxicated person or a child of tender years, *Lombardo v. DeShance*, 167 O.S. 431, 149 N.E.2d 914.

A guest who has alighted from a car ceases to be within the guest statute. *Clinger v. Duncan*, 166 O.S. 216, 141 N.E. 2d 156.

OREGON

A guest is defined as any person who accepts a ride in a motor vehicle without payment and who, for his own business or pleasure, receives the hospitality of the owner or the driver of the motor vehicle. *Rosa v. Briggs and Lafferty*, 200 Ore. 450, 266 P.2d 427; *Albrecht v. Safeway Stores, Inc.*, 159 Ore. 331, 80 P.2d 62.

A guest who wishes to escape application of the statute must establish a payment. Originally this required proof of a transfer of money or property or something of value in discharge of an existing obligation. *Haas v. Bates*, 150 Ore. 592, 47 P.2d 243; *Smith v. Laflar*, 137 Ore. 230, 2 P.2d 18. This requirement was officially discarded in *Luebke v. Hawthorne*, 183 Ore. 362, 192

P. 2d 990, where the court overruled *Smith v. Laflar, supra,* and held that a person who confers a substantial benefit on the owner or driver which is tangible, direct and material has made a payment and is, therefore, not a guest. What constitutes a substantial benefit is ordinarily a question of fact. *George v. Stanfield,* 33 F. Supp. 486, *Albrecht v. Safeway Stores, Inc., supra;* but see *Melcher v. Adams,* 174 Ore. 75, 146 P. 2d 354, holding that the performance of incidental voluntary services enroute was, as a matter of law, not a substantial benefit.

In *Kudrna v. Adamski,* 188 Ore. 396, 216 P.2d 262, the court attempted to engraft an exception onto the definition of the term guest. Holding that a four-year-old child was not a guest when she rode in a car in the custody of her mother, the court said that to become a guest one must exercise a free choice which a four-year-old child does not have the legal capacity to do. *Walker v. Sorenson,* 209 Ore. 406, 206 P.2d 737, narrowed this rule considerably. Here the court held that a child's status is determined by that of the parent, and stated that the *Kudrna* decision was based on a finding that the parent was not a guest. A child of twenty-nine months was, therefore, a guest when in the custody of his mother who was a guest.

SOUTH CAROLINA

Section 46-801 (1952) of the Code of Laws of South Carolina provides that, "No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

"This section shall not relieve a public carrier or any owner or operator of a motor vehicle which is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger while being transported by such public carrier or while such motor vehicle is being so demonstrated."

A review of the digest of decisions in South Carolina reveals that the determination of guest status has not been in issue in any of the cases arising out of the act decided by the South Carolina courts. However, this question did come before the Appellate Division of the New Jersey Superior Court in the case of *Kaufman v. Huss,* (January 15, 1960) which case involved the South Carolina guest statute as the accident occurred in South Carolina. The court held that the plaintiff passenger was a guest and could recover only in the event of intentional injury or wanton negligence, despite the fact that the passenger and the operator were sharing expenses on a trip to Florida. Sharing such expenses (which was insisted upon by the passenger rather than by the operator) did not take the passenger outside of the guest status.

SOUTH DAKOTA

Section 44.0362 of the South Dakota Code says a guest is one who is "transported by the owner or operator of a motor vehicle as his guest without compensation for such transportation . . .". The key word is "compensation". Actual payment in money or other tangible thing is not necessary, but the statute contemplates some benefit accruing from the transportation to the owner or operator of the vehicle in order to render a passenger not a guest. A child going to a parochial school is a guest, if riding without pay in a public school bus. *Schiltz v. Picton,* 66 S.D. 301, 282 N. W. 519. A son who came along to help his father look at some cattle was not a guest. *Kleinhesselink v. Porterfield,* 76 S.D. 577, 83 N.W. 2d 191.

Sharing expenses of the trip may or may not be the deciding factor. The consideration need not pass from the passenger to the driver. *Forsling v. Mickelson,* 66 S.D. 366, 283 N.W. 169. Insisting on a pre-arrangement to share expense may present a question for the jury. *Tennyson v. Kern,* 76 S.D. 136, 74 N.W. 2d 316. In *Gunderson v. Sopiwnik,* 75 S.D. 402, 66 N.W. 2d 510, a brother and sister, each married, shared family travel expenses, including some for unanticipated car repair, but this was held to be nothing more than the typical brother visiting sister occasion.

The passenger is a guest "unless the benefit he is to bestow on the owner or operator is sufficiently real, tangible and substantial to serve as the inducing cause of the transportation, and to operate to completely overshadow any consideration of mere hospitality growing out of friendship or relationship." *Scotvold v. Scotvold,* 68 S.D. 54, 298 N.W. 266.

TEXAS

Article 6701b of the Revised Civil Statutes of Texas applies to persons "transported over the public highways of this state by the owner or operator of a motor vehicle as his guest without payment for such transportation." By Section 2 of the act are excluded from its coverage public carriers and owners and operators of motor vehicles while the same are being demonstrated to prospective purchasers.

It is held that to make one a passenger as distinguished from a guest within the statute, there must be some definite, tangible benefit to the operator shown to have been the motivation for furnishing the transportation. *Franzen v. Jason,* Tex. Civ. App., 166 S. W. 2d 727; *Young v. Bynum,* Tex. Civ. App., 260 S. W. 2d 696; *Burt v. Lochausen,* 151 Tex. 289, 249 S.W. 2d 194.

It is not necessary, however, that the payment or benefit move from the person transported. It may be paid by a third person. *Cedziwoda v. Crane-Longley Funeral Home,* 155 Tex. 99, 283 S. W. 2d 217; *Freeman v. Ham,* Tex. Civ. App., 283 S. W. 2d 438; *Houston Belt & Terminal Railway Co. v. Burmester,* Tex. Civ. App., 309 S. W. 2d 271.

Where the host offered to transport the plaintiff so that they might continue a discussion concerning the host's brother's job as postmaster, mutual benefit was found. *Elkin v. Foster,* Tex. Civ. App., 101 S. W. 2d 294. So too the requisite benefit was found where the plaintiff was riding with the host, a real estate broker, to point out to him a farm which the plaintiff had listed for sale. *Johnson v. Smither,* Tex. Civ. App., 116 S. W. 2d 812.

Mere existence of a business relationship, however, is not sufficient where it is not the motivation for the transportation. *Burt v. Lochausen,* 151 Tex. 289, 249 S. W. 2d 194; *El Paso City Lines v. Fanchez,* Tex. Civ. App., 306 S. W. 2d 396.

Where there is no contract of hire, the mere sharing of expenses is not sufficient to remove one from the guest statute. *McClain v. Carter,* Tex. Civ. App., 278 S. W. 2d 877; *Easter v. Wallace,* Tex. Civ. App., 318 S. W. 2d 916.

UTAH

Utah Code Annotated, 1953, Sec. 41-9-2, defines a guest as "a person who accepts a ride in any vehicle without giving compensation therefor".

The first case that arose in Utah under this statute was *Jenson v. Mower,* 4 Utah 2d 336, 294 P.2d 683. Defendant advertised at his place of employment that he wanted riders and quoted a price for such transportation which was the same fare charged by the bus company. The riders had to agree to pay the price whether they rode that day or not. The court said, in holding that the plaintiff was not a guest, ". . . the cases turn not on whether money is received or paid as a result of carrying the rider, but upon the fact that the money or other consideration was given to the driver, not as a gratuity or in appreciation, but rather as an inducement for making the trip for the rider or furnishing carriage for the ride. If the driver extends the courtesy of a ride to a friend without more or takes on a hiker overtaken on the highway, the status of the guest in either case is not replaced by that of a passenger if gas is purchased, meals purchased or cash given to assist the driver in meeting expenses of the trip. Such rider is not in the car because of any compensation or payment which induced the driver to give the ride, that the driver had already done." The court was not called upon to rule upon the share the ride case, the car-pool case, nor the cases involving contribution to the expenses.

In *Eyre v. Burdette,* 8 Utah 2d 166, 330 P.2d 126, plaintiff had agreed to sell defendant some eggs from plaintiff's ranch and plaintiff asked defendant and another person to accompany plaintiff to the ranch. By mutual agreement they decided to go in defendant's car. The court held the passenger was a guest since he had not paid anything for the ride and there was no evidence that the driver requested the plaintiff to go with him, nor that the defendant received any tangible payment from the plaintiff, monetary or otherwise, which was a motivating influence for furnishing the transportation.

VERMONT

Under the Vermont statutory law, a guest occupant of an automobile is one who does not pay or contract to pay for the carriage.

The supreme court has held that a person riding in an automobile with the knowledge and consent of the owner is no less a guest because he had asked for the privilege of doing so. *Stevens v. Nurenberg,* 117 Vt. 525, 97 A. 2d 250.

In general it can be stated that anyone who by legal interpretation pays for his carriage, is not a guest. Thus where a police officer during a strike was riding on a milk truck for the purpose of protecting it, its contents and the owner, without pay from the owner, he is not a gratuitous guest under the statute. *Russell v. Pilger,* 113 Vt. 537, 37 A. 2d 403.

Where plaintiff, an employee, riding in automobile, driven and owned by defendant, president and manager of corporation, at his direction on business of corporation, was injured, whether plaintiff was guest or passenger for hire, was held a question for the jury. *Shappy v. McGarry,* 106 Vt. 466, 174 A. 856. Where plaintiff paid defendant son money, as partial payment for expense of trip, it was held plaintiff was passenger for hire and it was not necessary to allege or prove gross negligence. *Campbell v. Campbell,* 104 Vt. 168, 162 A. 379.

VIRGINIA

Under Section 8-646.1 of the Code of Virginia, 1950, "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator.

Persons riding by express invitation are guests, and the rule applies also to those who are self-invited. *Miller v. Ellis,* 188 Va. 207, 49 S.E. 2d 273.

It is not necessary that the operator of the vehicle receive actual cash in return for the transportation supplied. *Dickerson v. Miller,* 196 Va. 659, 85 S.E. 2d 275.

WASHINGTON

The statute makes it clear that any person who is transported in a motor vehicle on the invitation of the owner without payment is a guest. RCW 46.08.080. See *Finn v. Drtina,* 30 Wash. 2d 814, 194 P. 2d 347, holding that a member of the driver's family may be a guest.

The declared purpose of the statute is to prevent collusion against insurance companies. That is exemplified in *Akins v. Hemphill,* 33 Wash. 2d 735, 207 P. 2d 195, which established the anomaly of an involuntary guest. The case holds that upon accepting an invitation to ride in another's car, a person becomes a guest for the entire journey and cannot thereafter disclaim guest status by demanding to be let out of the car. The court relied upon *Taylor v. Taug,* 17 Wash. 2d 533, 136 P. 2d 176. The case is criticized in 25 Wash. L. Rev. 246 and 63 Harv. L. Rev. 528.

Prior to the decision in *Poutre v. Saunders,* 19 Wash. 2d 561, 143 P. 2d 554, a much used method of escaping guest status was to prove a joint adventure. A review of the cases is found in *Carbonneau v. Peterson,* 1 Wash. 2d 347, 95 P. 2d 1043. These cases required: (1) a contract; (2) a common purpose; (3) a community of interest; and (4) an equal right of control. The common purpose could be social as well as business. *Pence v. Berry,* 13 Wash. 2d 564, 125 P. 2d 645. In addition, equal right of control could be and nearly always was inferred from the "contract". The *Poutre* decision placed a great deal more emphasis on equal right of control. The court held that if the plaintiff establishes "a joint undertaking of a *business nature,* for material gain or profit," right of control is conclusively presumed to exist. In the absence of a business undertaking, right of control is a question of fact which can only be established by proving a control, which *by its terms* provides for such control. The joint adventure avenue of escape from the guest status has not been successfully travelled since this decision.

To establish the payment exception, a plaintiff must meet the requirements stated in *Fuller v. Tucker,* 4 Wash. 2d 426, 103 P. 2d 1086. These are: "(1) The transportation must be motivated by the expectation of a benefit, and (2) an actual or potential benefit in a material or business sense must result or have the potential of resulting to the owner." The difficulty of applying this formula was demonstrated in *Scholz v. Lewer,* 7 Wash. 2d 76, 109 P. 2d 294. However, the rule is still followed by the court. *Woolery v. Shearer,* 153 Wash. Dec. 141, 332 P. 2d 236.

The case of *Nogosek v. Truedner,* 154 Wash. Dec. 940, 344 P. 2d 1028, is in accord with the rule of *Fuller v. Tucker, su-*

pra, and *Woolery v. Shearer, supra,* regarding payment. Particular emphasis was placed on the motivation requirement.

WYOMING

In *Fox v. Fox,* 75 Wyo. 390, 296 P. 2d 252, plaintiff was defendant's daughter-in-law and was riding with defendant back to defendant's home to pick up a truck used to transport produce from a farm, operated by defendant and plaintiff's husband. The court held that the plaintiff was outside the guest statute by showing that the defendant had an actual, potential, tangible substantial or material benefit arising out of the transportation of the plaintiff. Defendant expected to receive benefit from having the plaintiff drive the truck back to the farm, because then his farm crop could be harvested within the necessary time.

In *Hinton v. Wilmes,* Wyo., 343 P. 2d 201, the employee-plaintiff was driven to his work site at the Atlantic Refining Company by an employee of the refining company, even though plaintiff was actually employed by another employer, but was on duty at the refining company. The court held that the plaintiff was not a guest because the refining company received the benefit of having plaintiff get to the distant job site on time. The court stated that employees are rarely considered as guests and this was true here even though the plaintiff was not technically an employee of the refining company.

PART III

What is Required to Impose Liability On the Owner or Driver?

ALABAMA

Before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury. *Drake v. Gaines,* 224 Ala. 519, 140 So. 600; *Godfred v. Vinson,* 215 Ala. 166, 110 So. 13. "Gross negligence" is negligence, not wantonness. *Smith v. Roland,* 243 Ala. 400, 10 So.2d 367. Speed alone is not sufficient evidence from which wantonness can be inferred, *Griffin Lumber Company v. Harper,* 252 Ala. 93, 39 So. 2d 399, and a mere error in judgment constitutes simple negligence, not wantonness. *Berryham Ry. Light and Power Co. v. Norton,* 7 Ala. App. 571, 61 So. 2d 459. The definition of "wantonness" must be read in the light of the circumstances surrounding the particular facts. *Wilhite v. Webb,* 253 Ala. 606, 46 So. 2d 414. To be a wilful injury, it must have been an intentional one, and distinguished from an intentional act merely. To be a wanton injury, one must be conscious of his conduct and that injury would likely result, but with reckless indifference to consequences must intentionally commit a wrongful act which produces the injury. *Day v. Downey,* 256 Ala. 587, 56 So. 2d 656.

ARKANSAS

Section 75-913 Ark. Stats, imposes liability when the vehicle is "wilfully and wantonly operated in disregard of the rights of others". Section 75-915 Ark. Stats. imposes liability if injury results from "wilful misconduct of such owner or operator".

The degree of misconduct required under both statutes to impose liability in favor of a guest is held to be the same. *Scott v. Sharrich,* 225 Ark. 59, 279 S. W. 2d 39. The defendant driver or operator must be guilty of something more than gross negligence. There must be proof that he was conscious that his conduct would naturally or probably result in injury although it is not necessary that he intend injury. *Splawn v. Wright,* 198 Ark.197, 128 S. W. 2d 248; *Steward, Admr. v. Thomas,* 222 Ark. 849, 262 S. W. 2d 901.

The facts of each case must be considered to determine whether the conduct complained of constitutes wilful and wanton misconduct. It has been held that continuing to drive at excessive speeds over the protest of passengers may be held sufficient to support a finding of wilful and wanton misconduct. *Froman v. J. R. Kelley Stove & Heating Co.,* 196 Ark. 808, 120 S. W. 2d 164; *McAllister v. Calhoun,* 212 Ark. 17, 205 S. W. 2d 40; *Scott v. Sharrich,* 225 Ark. 59, 279 S. W. 2d 39; *Cooper v.*

Chapman, 226 Ark. 331, 289 S. W. 2d 686; *Callaway v. Cherry*, Ark., 314 S. W. 2d 506. On the other hand, excessive speed over the protests of passengers under other fact situations has been held insufficient to support a finding of wilful and wanton misconduct. *Splawn v. Wright*, 198 Ark. 197, 128 S. W. 2d 248; *Edwards v. Jeffers*, 204 Ark. 400, 162 S.W. 2d 472; *Steward, Admr. v. Thomas*, 222 Ark. 849, 262 S. W. 2d 901. Permitting a car to roll backwards onto the highway while shifting gears has been held not wilful and wanton. *Cooper v. Calico*, 214 Ark. 853, 218 S. W. 2d 723.

Driving in heavy fog and attempting to pass another vehicle with a headon collision resulting has been held wilful and wanton. *Harkrider v. Cox, Ark.*, 321 S.W. 2d 226.

CALIFORNIA

Under California law it appears that either proof of intoxication or proof of wilful misconduct is necessary to impose liability for an injury to a guest.

What constitutes wilful misconduct also appears to be a question for the jury. But it has been held to be more than gross negligence. *Sheldon v. Burlingame*, 146 Cal. App. 2d 30, 303 P. 2d 344.

It appears that wilful misconduct, within the meaning of the guest statute, is intentionally doing something in the operation of a motor vehicle which should not be done, or intentionally failing to do something which should be done, under circumstances disclosing express or implied knowledge that injury to a guest will be a probable result. *Bassett v. Crisp*, 113 Cal. App. 2d 295, 248 P. 2d 171.

In *Gillespie v. Rawlings*, 49 Cal. 2d 359, 317 P. 2d 601, the supreme court held that in an action for injuries sustained by rider in defendant's automobile when it collided with another vehicle, evidence was insufficient to support finding that defendant was guilty of that wanton and reckless disregard of possible consequenses or that knowledge of probable injury, which characterizes wilful misconduct, where it appeared that defendant's pulling into adjacent lane of travel and into oncoming car was culpable error of judgment which amounted to negligence only.

In *Johnson v. Marquis*, 93 Cal. App. 2d 341, 209 P.2d 63, it was held that evidence of speed alone will not support a finding of wilful misconduct, but such a finding is sustained by evidence that the driver has knowledge of the hazards of the road she is traversing, drives at a speed of eighty miles per hour on a night requiring windshield wipers, around a curve, down a grade, does not see a parked truck illumiated by warning lights, and crashes into it.

In *Hallman v. Richards*, 123 Cal. App. 2d 274, 266 P. 2d 812, the court defined wilful misconduct substantially as follows:

> "To constitute wilful misconduct within meaning of automobile guest statute there must be actual knowledge, or that which in law is esteemed to be equivalent of actual knowledge, of peril to be apprehended from failure to act, coupled with a conscious failure to act to the end of averting injury, and actual knowledge or its equivalent that injury to guest will be the probable result."

COLORADO

A guest may recover in the case of (1) intentional accident; (2) accident caused by driver's intoxication; (3) negligence consisting of wilful and wanton disregard of others' rights. Wilful and wanton negligence requires a consciousness of heedless and reckless conduct by which the safety of others is endangered. The actor must be fully aware of the danger and should have realized its probable consequenses and yet deliberately avoids all precautions to prevent disaster. *Pettingell v. Moede*, 129 Colo. 484, 271 P. 2d 1038; *Graham v. Shilling*, 133 Colo. 5, 291 P. 2d 396.

What constitutes wilfulness and wantonness is a question of fact. Excessive speed is not sufficient, *Loeffer v. Crandall*, 129 Colo. 384, 270 P. 2d 769; *Millington v. Hiedloss*, 96 Colo. 581, 45 P. 2d 937. However, excessive speed with another factor may be enough, as passing on the wrong side on a hill, *Jaeckel v. Funk*, 111 Colo. 179, 138 P. 2d 939, or passing on the wrong side at night, *Clark v. Hicks*, 127 Colo. 25, 252 P. 2d 1067.

DELAWARE

"No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for such damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part

of such owner or operator, or was caused by his wilful or wanton disregard of the rights of the others." 21 Del. C. Sec. 6101 (a).

A "conscious indifference" to circumstances in a situation, where the probability of harm to others was reasonably apparent, was held to be "wanton misconduct". *Costello v. Cording,* 47 Del. 322, 91 A. 2d 182. But crossing the white line into a lane of oncoming traffic, against the express protest of passengers, is not "wilful or wanton misconduct" in itself.

Speeding, per se, is no more than negligence and not actionable under the guest statute. *Gallagher v. Davis,* 38 Del. 380, 183 Atl. 620.

Approaching and entering an unmarked intersection at an excessive rate of speed is not itself "wilful or wanton misconduct". *Law v. Gallagher,* 39 Del. 189, 197 Atl. 479.

Speeding while intoxicated, in the face of the guest's protests may give rise to an inference of "wilful and wanton misconduct". *Gerhauser v. Deemer,* 49 Del. 328, 116 A. 2d 175.

FLORIDA

Unless coming within one of the exceptions described in Part II, *supra,* Florida statute requires gross negligence or wilful and wanton misconduct. The two have been held to be synonymous in meaning, *Kroger v. Hollahan,* 144 Fla. 779, 198 So. 635, and it appears when the defendant's conduct "shows a reckless disregard for human life, or that entire want of care which would raise the presumption of a conscious indifference to consequences, or shows such wanton and reckless indifference to the rights of others as may be equivalent to an intentional violation of such rights, and even where there is no actual intention to inflict damage or injury." *Jackson v. Edwards,* 144 Fla. 187, 197 So. 833.

Excessive speed alone is not gross negligence, *Brown v. Roach,* Fla., 67 So. 2d 201, but when combined with other facts, may be. *Cadore v. Karp,* Fla., 91 So. 2d 806.

A sudden physical collapse, blackout or fainting is not gross negligence unless there is a premonition or past experience with such attacks. *Bridges v. Speer,* Fla., 79 So. 2d 679. Similarly, when driver falls asleep. *Bryan v. Bryan,* Fla., 59 So. 2d 513.

Momentary lapse of memory, inattention or mistake of judgment is not gross negligence. *Miller v. State,* Fla., 75 So. 2d 312.

The fact that the statute says that the "question of proximate cause, and the issue or question of assumed risk, shall in all such cases be solely for the jury" is not necessarily so and the judge may still direct a verdict in proper cases. *Cormier v. Williams,* 148 Fla. 201, 4 So. 2d 525; *Kroger v. Hollahan,* 144 Fla. 779, 198 So. 685; *Leslie v. West,* Fla., 38 So. 2d 821.

Running through a stop sign or through a traffic light usually presents a jury question. *McMillan v. Nelson,* 149 Fla. 334, 5 So. 2d 867; *Hunt v. State,* Fla., 87 So. 2d 584, but it may not necessarily be so. *Porter v. State,* Fla., 88 So. 2d 924, and *Vinhon v. McCormick,* Fla., 109 So. 2d 400.

GEORGIA

No statutory provision fixes host's liability to guests, but gross negligence as the basis exists by judicial decision. *Epps v. Parrish,* 26 Ga. App. 399, 106 S.E. 297; *Carpenter v. Lyons,* 78 Ga. App. 214, 50 S.E. 2d 850; *Hennon v. Hardin,* 78 Ga. App. 81, 50 S. E. 2d 236; *Hicks v. Asbury,* 99 Ga. App. 8, 107 S.E. 2d 337; *Whitfield v. Wheeler,* 76 Ga. App. 857, 47 S.E. 2d 658.

Georgia Code Annotated, Section 105-203, is applicable, defining slight diligence and gross negligence.

The duty may be reduced to ordinary negligence by a protest from the guest under certain circumstances such as refusal of the driver to allow the guest to leave the automobile. *Blanchard v. Ogletree,* 41 Ga. App. 4, 152 S.E. 116, and *Wachtel v. Bloch,* 43 Ga. App. 756, 160 S. E. 97.

The violation of a state law does not necessarily amount to gross negligence. *Hennon v. Hardin, supra.*

Wilful and wanton negligence is not the same as gross negligence. *Hennon v. Hardin, supra.* Gross negligence is equivalent to the failure to exercise a slight degree of care. *Tucker v. Andrews,* 51 Ga. App. 841, 181 S. E. 673.

The dangerous instrumentality doctrine has not been adopted, hence liability of the owner rests upon the doctrine of master and servant or upon the Family Purpose Statute, Georgia Code Annotated, Section 105-108, which relates to guest passenger cases. *Curtis v. Ashworth,* 165 Ga. 782, 142 S.E. 111; *Dodgen v. DeBorde,* 43 Ga. App. 131, 158 S. E. 64.

IDAHO

Section 49-1401 of the Idaho Code makes the owner or operator liable to a guest if the accident was "intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

On the question of what constitutes "reckless disregard", the supreme court has upheld a jury's finding for plaintiff where defendant was driving fifty miles per hour, went to sleep behind the wheel of his car, and drove off the road into a ditch. *Manion v. Waybright,* 59 Idaho 643, 86 P. 2d 181. Driving forty-five miles per hour at night on a road with many curves and with lights of approaching automobiles impairing vision has also been held to constitute "reckless disregard". *Hughes v. Hudelson,* 67 Idaho 10, 169 P. 2d 712.

On the other hand, a showing that defendant was traveling sixty-five miles per hour when a blowout of a worn tire occurred has been insufficient to establish liability to a guest. *Riggs v. Roberts,* 74 Idaho 473, 264 P. 2d 698. Likewise, where there was no evidence of excessive speed, the mere fact that defendant's automobile ran off the road at a dangerous place would not be sufficient to permit a guest to recover. *Mason v. Mootz,* 73 Idaho 461, 253 P. 2d 240.

As indicated in *Buffatt v. Schnuckle,* 79 Idaho 314, 316 P. 2d 887, where the trip is in the scope of the common employment of both owner or driver and occupant, the guest statute has no application and proof of ordinary negligence is sufficient to establish liability. It would logically follow that the same rule would apply where the occupant is being transported in direct furtherance of the owner or operator's business.

ILLINOIS

In order for the guest to recover from the driver or owner, or his employee or agent, wilful and wanton misconduct contributing to the injury, death, or loss, must be established. The party acting, or failing to act, must be conscious of his conduct, and conscious from his knowledge of the surrounding circumstances that his conduct will probably result in injury. *Chism v. Decatur Newspapers,* 340 Ill. App. 42, 91 N.E. 2d 114. Negligence and wilful and wanton misconduct are not synonymous. *Countryman v. Sullivan,* 344 Ill. App. 371, 100 N.E. 2d 799.

The driver of a vehicle approaching a preferred highway is not entitled to stop for a stop sign and then proceed without determing that he can do so with reasonable safety, and to be guilty of wilful and wanton misconduct it is not necessary that the motorist shall have intended that harm should ensue, but it is sufficient if he had notice which would alert a reasonable man that substantial danger was involved, and that he failed to take reasonable precautions under the circumstances. *Hering v. Hilton,* 12 Ill. App. 2d 599, 147 N.E. 2d 311; *Stephens v. Weigel,* 336 Ill. App. 36, 82 N.E. 2d 697.

Speed alone well not support a verdict in favor of a guest. *Green v. Yeager,* 336 Ill. App. 312, 83 N.E. 2d 385; *Shephens v. Weigel, supra; Aldridge v. Morris,* 337 Ill. App. 369, 86 N.E. 2d 143; *Signa v. Alluri* 351 Ill. App. 11, 113 N.E. 2d 475; *Amenda v. Suits,* 6 Ill. App. 395, 128 N.E. 2d 367. But liability may be established when speed is combined with other circumstances; rounding curve at excessive speed after warning by guest, *O'Neil v. Caffarello,* 303 Ill. App. 445, 25 N.E. 2d 534; failure to keep a lookout and not stopping at intersection, *Lanes v. Duffey,* 301 Ill. App. 627, 22 N.E. 2d 476; racing and failure to observe warning signs, *Burke v. Malloy,* 294 Ill. App. 442, 14 N.E. 2d 279; high speed and loss of control, *Simmons v. Nichols,* (no state citation), 5 N.E. 2d 109; passing at high speed and skidding, *Trust Company of Chicago, Admr. v. Ancateau,* 317 Ill. App. 186, 146 N. E. 2d 125; swerving from one side of road to other at speed of sixty miles per hour and failure to reduce speed at curve, *Hilyard v. Duncan,* 21 Ill. App. 514, 158 N. E. 2d 438.

Where driver knew he was sleepy and apt to fall asleep, wilful, wanton and malicious misconduct was established. *Marks v. Marks,* 308 Ill. App. 276, 31 N.E. 2d 399.

An owner knowing defective condition of steering gear who loans the vehicle to driver is guilty of wilful and wanton misconduct. *Dyreson v. Hughes,* 333 Ill. App. 198, 76 N.E. 2d 809.

INDIANA

If the person injured or killed was a "guest", he or his personal representative must show that the owner, operator or person responsible for operation was guilty of "wanton or wilful misconduct" causing

the injuries or death. Burns Indiana Statutes Annotated, Section 47-1021.

"Wilful or wanton" misconduct, within the statute, consists of the conscious and intentional doing of a wrongful act, or the omission of a duty, with reckless indifference to consequences under circumstances which show that the doer has knowledge of the existing conditions and that injury will probably result. *Swinney v. Roler,* 113 Ind. App. 315, 63 N.E. 2d 163; *Becker v. Strater,* 117 Ind. App. 504, 72 N.E.2d 580; *Brown v. Saucerman,* 237 Ind. 598, 145 N. E. 2d 898; *Sausaman v. Leininger,* 237 Indiana 508, 146 N.E. 2d 414; *Eikenberry v. Neher,* 126 Ind. App. 571, 134 N.E. 2d 710. But neither ill will nor a deliberate or intentional attempt to injure are essential elements of "wanton or wilful" misconduct. *Bedwell v. DeBolt,* 221 Ind. 600, 50 N.E. 2d 875; *Swinney v. Roler, supra; Sausaman v. Leininger, supra; Eikenberry v. Neher, supra.*

In *Swinney v. Roler, supra,* the evidence was held insufficient for the jury though the host, approaching an intersection, had knowledge of the approach of another car and still continued at a high rate of speed until it was too late to avoid collision, since the host had concluded that the other car was stopping. A like conclusion was reached in *Albert McGann Securities Co. v. Coen,* 114 Ind. App. 60, 48 N.E. 2d 58, where the evidence showed that the host was traveling seventy to eighty miles per hour on a clear day on a straight level road, without protest from the guest as to speed, and the collision was caused by an oncoming vehicle's crossing to the wrong side of the road.

Each case must be decided on its own facts and frequently the evidence presents a jury question as to whether the misconduct was "wanton or wilful". Mere speed, in and of itself, is not "wanton or wilful misconduct", but speed may be so excessive and the danger of injury to a guest so probable, that the misconduct will be held to meet the statutory requirement. See *Brown v. Saucerman, supra,* in which the court was evenly divided though the car was traveling seventy-five to eighty miles per hour, at night, on a wet road, having insufficient tread on its tires, and passed across the road on a curve into the path of an oncoming vehicle. In *Miller v. Smith,* 125 Ind. App. 293, 124 N.E. 2d 874, it was held to be a jury question whether the misconduct was "wanton or wilful" where the car was driven at a railroad crossing into the path of an approaching train. It was held to be a jury question, too, in *Eikenberry v. Neher, supra,* where the vehicle was driven by the host, in fog and mist and on a wet pavement, past a tractor-trailer and into collision with an approaching vehicle in its own lane. The question was properly left to the jury also in *Sausaman v. Leininger, supra,* where the host in a coasting vehicle took the key from the ignition (causing the steering wheel to lock and the vehicle to strike a tree. Where a motorist, after crossing the center line of a highway and into the left side thereof, sees a car approaching from the opposite direction in such close proximity that he cannot pass, but continues on his course, his conduct exhibits such a conscious indifference to consequences as will constitute wanton misconduct. *Hoesel v. Cain,* 222 Ind. 330, 53 N.E. 2d 165. Driving at a high rate of speed on highways covered with sleet, snow or ice may constitute wanton and wilful misconduct. *Ridgway v. Yenny,* 223 Ind. 16, 57 N.E. 2d 581; *Loehr v. Meuser,* 120 Ind. App. 630, 93 N.E. 2d 363. Intoxication, accompanied by excessive speed, or weaving from side to side, has been held to constitute wanton and wilful misconduct. *Hubble v. Brown,* 227 Ind. 202, 84 N. E. 2d 891.

IOWA

Under the Code of Iowa, 1954 (Sec. 321.494), to impose liability it is necessary that the cause of the injury is due to "the influence of intoxicating liquor or because of the reckless operation" of the driver.

It is held that speed alone and of itself does not amount to recklessness. *Thornbury v. Maley,* 242 Iowa 70, 45 N.W. 2d 576, 579; *McDonald v. Dodge,* 231 Iowa 325, 331, 1 N. W. 2d 280. However, whether a particular speed is dangerous depends on the surroundings and the attendant circumstances. *Cerny v. Secor,* 211 Iowa 1232, 1237, 234 N.W. 193; *Whiting v. Stephas,* 247 Iowa 473, 74 N.W. 2d 228. Thus, excessive speed combined with inattention and the inability to negotiate a curve did amount to recklessness within the meaning of the statute. *Anderson v. Elliot,* 244 Iowa 670, 57 N. W. 2d 792.

"Recklessness" is more than negligence or want of reasonable care. It implies proceeding with no care and without heed or concern of the consequences. The test of

"reckless" within the guest statute is not good intentions or mental attiude but acts or omissions. *Fraser v. Brannigan,* 228 Iowa 572, 293 N.W. 50; *Wright v. Mahaffa,* 222 Iowa 872, 876, 270 N.W. 402, 404; *Davis v. Knight,* 239 Iowa 1338, 35 N.W. 2d 23. The standard for measuring such recklessness within the guest statute is whether reasonable men might draw an inference of no care coupled with disregard of the consequences. *Anderson v. Elliot, supra.*

In particular, it was held that a driver's failure to see a left-turn signal two cars in front of him, plus his failure to observe highway signs indicating approach to an intersection, was insufficient to make a showing of recklessness as to constitute conscious indifference to the consequences. *Schneider v. Parish,* 242 Iowa 1147, 49 N. W. 2d 535.

KANSAS

In this respect the statute of G.S. 1949, 8-122b is quite clear and explicit. "No person * * * shall have a cause of action * * * unless * * * such * * * shall have resulted from the gross and wanton negligence of the operator of such vehicle." This is strictly adhered to.

An automobile host who drove his auto at forty to fifty miles an hour with headlights that would not reveal objects of more than seventy-five to one hundred feet and, when confronted with cattle on the highway attempted to go through an opening instead of applying his brakes, was held not guilty of "reckless and wanton misconduct" within the statute. *Aduddell v. Brighton,* 141 Kan. 617, 42 P. 2d 555.

A host driving at speed of sixty-five miles an hour (in 1935) with a rear tire which was somewhat worn and which blew out was not guilty of such reckless disregard of consequences as to amount to willingness to injury (reckless and wanton). *Anderson v. Anderson,* 142 Kan. 463, 50 P. 2d 995.

Shifting of truck gears by truck driver without warning to guest when driver had good reason to know the guest was making an effort to place a rock under a wheel was held not "wantonness" or "gross and wanton negligence" within the automobile guest statute. *Cohee v. Hutson,* 143 Kan. 784, 57 P. 2d 35.

A reasonably high rate of speed on an open highway is not, of itself, evidence of gross and wanton negligence. *Srajer v. Schwartzman,* 164 Kan. 241, 188 P. 2d 971. Nor does driving at forty-seven miles per hour on a narrow slippery highway at night show necessary "gross and wanton negligence" to come within the guest statute, though the guest requested the host to slow down. *Mason v. Banta,* 166 Kan. 445, 201 P. 2d 654.

Excessive speed does not always indicate indifference to the consequences, as required to constitute wantonness. To avoid being guilty of "wantonness" a motorist is not required to stop or slow down unless known circumstances make him aware of peril to another. *Elliot v. Peters,* 163 Kan. 631, 185 P. 2d 139.

A wanton act in the automobile guest statute is something more than ordinary negligence and something less than wilful injury.

MASSACHUSETTS

There is a distinction between social guests and business guests. For a social guest to recover, there must be gross negligence. *Massaletti v. Fitzroy,* 228 Mass. 487, 118 N.E. 168. However, in a death case involving a social guest, the estate need show only ordinary negligence. *Flynn v. Lewis,* 231 Mass. 550, 121 N.E. 493.

A business guest need show only ordinary negligence and where a benefit is conferred upon the owner or operator by the presence of a guest, that guest is a business guest. *Hanlon, Adm. v. White Fuel Corp.,* 328 Mass. 455, 104 N.E. 2d 424; *Taylor v. Goldstein,* 329 Mass. 161, 107 N.E. 2d 14; *Lyttle v. Monto,* 248 Mass. 340, 142 N.E. 795.

Gross negligence usually involves a series of acts, none of which would constitute gross negligence of itself. Thus, liquor alone is not sufficient; there must be evidence that the driver was affected by it. *Blackman v. Coffin,* 300 Mass. 432, 15 N.E. 2d 469; *Dean v. Bolduc,* 296 Mass. 15, 4 N. E. 2d 441; *McCarron v. Bolduc,* 270 Mass. 39, 169 N.E. 559.

Falling asleep of itself is not gross negligence but proof of heavy drowsiness preceding it, prior dosing, etc., is sufficient, *Flynn v. Hurley,* 332 Mass. 182, 124 N.E. 2d 810; *Bellette v. Morin,* 322 Mass. 214, 76 N.E. 2d 660; *Mullanay v. White,* 329 Mass. 464, 109 N.E. 2d 158.

Speed of itself is not gross negligence but, if combined with other circumstances such as inattention, may be. *Kohotynski v. Kohotynski,* 296 Mass. 74, 5 N.E. 2d 345; *Haggerty v. Sullivan,* 301 Mass. 302, 17 N. E. 2d 154.

Knowingly operating an automobile with defective brakes or steering apparatus, in combination with speed or other negligence, adds up to gross negligence. *Logan v. Reardon,* 274 Mass. 83, 174 N.E. 264; *Cini v. Romeo,* 290 Mass. 532, 195 N.E. 732; *Gionet v. Shepardois,* 277 Mass. 308, 178 N.E. 649; *Savin v. Block,* 297 Mass. 487, 9 N.E. 2d 536.

MICHIGAN

The owner is liable for the wilful and wanton misconduct of his driver, this liability being statutory and not based on the doctrine of respondeat superior. *Peyton v. Delnay,* 348 Mich. 238, 83 N. W. 2d 204.

"It is not possible to mark with exact nicety a line which may be said to be the boundary between ordinary negligence on the one hand and gross negligence or wilful and wanton misconduct on the other". *Rowe v. Vander Kolk,* 278 Mich. 564, 270 N.W. 788. The general rule, often quoted in later cases, is laid down in *Willett v. Smith,* 260 Mich. 101, 244 N.W. 246: "(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another". Thus the guest has some control in that his protest can apprise the driver of the danger.

The guest ordinarily assumes the risk of defects in the automobile. *Schneider v. Draper,* 276 Mich. 259, 267 N.W. 831; *Gifford v. Dice,* 269 Mich. 293, 257 N.W. 830. Ordinary negligence is not sufficient to impose liability, *Butine v. Stevens,* 319 Mich. 176, 29 N.W. 2d 325 (falling asleep); *Bonnici v. Kindsvater,* 275 Mich. 304, 266 N. W. 360 (intoxication); *Van Blaircum v. Campbell,* 256 Mich. 527, 239 N.W. 865 (improper lookout). Speed alone is not sufficient to impose liability, *Bushie v. Johnson,* 296 Mich. 8, 295 N.W. 538.

Wilfulness and wantonness can be shown by a "reckless state of mind", *Titus v. Lonergan,* 322 Mich. 112, 33 N.W. 2d 685; and can be express, *Cain v. Enyon,* 331 Mich. 81, 49 N.W. 2d 72; or implied, *Karney v. Upton,* 353 Mich. 262, 91 N.W. 2d 297. Characteristic of the cases of liability is a persistent recklessness, usually with a warning by the guest. Speed is usually a factor, *Tuinstra v. Lynema,* 340 Mich. 534, 66 N. W. 2d 252; plus drinking, *Kocks v. Collins,* 330 Mich. 423, 47 N.W. 2d 676; plus swerving or driving on the wrong side of the road, *Cramer v. Dye,* 328 Mich. 370, 43 N. W. 2d 892; *Price v. Western,* 330 Mich. 680, 48 N.W. 2d 149.

The recent Michigan decisions hold that wilful and wanton misconduct can be inferred from the facts, and thus usually presents a question for the jury. *Horton v. Fleser,* 340 Mich. 68, 64 N.W. 2d 605; *Tien v. Barkel,* 351 Mich. 276, 88 N.W. 2d 552; *Stevens v. Stevens,* 355 Mich. 363, 94 N.W. 2d 858.

MONTANA

Gross negligence must be proven. Gross negligence does not mean wilful and wanton misconduct. *Baatz v. Noble,* 105 Mont. 59, 69 P. 2d 579; it is something more than ordinary negligence; it is the want of slight care. *Nangle v. Northern Pacific Ry. Co. et al.* 96 Mont. 512, 520, 32 P. 2d 11; *Baatz v. Noble, supra; Cowden et al., v. Crippen,* 101 Mont. 187, 201, 53 P. 2d 98.

Gross negligence usually amounts to a combination of acts. Drinking alcohol alone would not be sufficient without showing that the driver was affected by it. *Westergard v. Peterson,* 117 Mont. 550, 159 P. 2d 518.

Speed in and of itself is not gross negligence but if shown to be so excessive as to affect driver's control under existing conditions, then it is sufficient. *Cowden v. Crippen, supra; Baatz v. Noble, supra.* Same speed past danger signs and through dangerous spot in road as on good road is sufficient for jury. *Baatz v. Noble, supra.* Speed coupled with failure to slow when blinded by oncoming lights is sufficient for jury. *Westergard v. Peterson, supra.* excessive speed after protest and skidding, causing door to come open, is sufficient for jury. *Batchoff v. Craney,* 119 Mont. 157, 172 P. 2d 308. Thirty-five to fifty miles per hour on icy road with which driver was familiar, skidding and overturning on dangerous crossing is sufficient. *Nangle v. Northern Pacific Ry. Co., supra.* Where driver, after several attempts to pass truck which would not give him the right of way, drove his car at a rapid rate of speed

on soft shoulder and overturned, case is sufficient for jury. *Blinn v. Hatton,* 112 Mont. 219, 221, 114 P. 2d 518.

No direct evidence other than that the driver, without reason, turned toward the left at an angle of forty-five degrees, hitting tree, is sufficient for the jury. *Doheny v. Coverdale,* 104 Mont. 534, 546, 68 P. 2d 142.

NEBRASKA

The operator or owner must be either under the influence of intoxicating liquor or guilty of gross negligence. Neb. Rev. Stat., Sec. 39-740 (Reissue 1952). Gross negligence means great and excessive negligence, that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Pesten v. Nelson,* 168 Neb. 243, 95 N.W. 2d 491; *Lusk v. York County,* 158 Neb. 662, 64 N. W. 2d 338.

What amounts to gross negligence depends upon the circumstances and facts of each case and the burden of proof is upon the guest to show that the driver was guilty of gross negligence, *Lusk v. York County, supra.*

Thus, the violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle and the like, is not negligence as a matter of law, but is a fact to be considered along with other evidence. *Eilts v. Bendt,* 162 Neb. 538, 76 N. W. 2d 623. Losing control of the car does not establish even simple negligence, *Born v. Estate of Matzner,* 159 Neb. 169; 65 N.W. 2d 593; but evidence of drinking may be considered in determining gross negligence. *Cunning v. Knott,* 157 Neb. 170, 59 N.W. 2d 180.

A verdict should not be directed for the defendant nor a cause of action dismissed unless the court can definitely determine that the evidence fails to reach that degree of negligence that is considered gross. *Paxton v. Nichols,* 157 Neb. 152, 59 N.W. 2d 184; *Jennings v. Lowery,* 168 Neb. 831, 97 N.W. 2d 345.

NEVADA

There is no liability for injury to a nonpaying guest unless the injury proximately results from intoxication, wilful misconduct or gross negligence of the person operating the vehicle. (Nevada Revised Statutes, Sec. 41.180).

In *Garland v. Greenspan,* Nev., 323 P. 2d 27, it was conceded that plaintiff was a guest under the statute and that recovery is there denied save where injury was caused by intoxication, wilful misconduct or gross negligence. In that case judgment was for the defendant driver and the plaintiff guest appealed. The supreme court held, in affirming the judgment, that evidence that defendant's automobile, shortly before upsetting, had passed another automobile in excess of sixty-five miles per hour and that, in returning to right hand lane, defendant driver for some unexplained reason had lost control of auto and it turned over several times, did not establish as a matter of law that defendant driver was guilty of gross negligence or wilful misconduct.

The court also held that the doctrine of *res ipsa loquitur* could not supply an inference of gross negligence or wilfulness on the part of the driver, so as to authorize the guest to recover for the injuries sustained.

NEW JERSEY

Apart from the distinction made by the "Unsatisfied Claim and Judgment Fund Law", N.J.R.S. 39:6-61, the issue still remains in New Jersey whether the status of the injured party is that of "invitee" or "licensee". In the field of automobile law —as distinguished from "land law"—there is no difference between social invitees and business invitees. As long as they are invitees and not licensees, the host must abstain from *ordinary negligence.* If they are licensees—and this includes the passenger who solicits the ride from the host—liability exists only if *gross or wanton negligence* is present. *Lippman v. Ostrum,* 22 N.J. 14, 123 A. 2d 230; *Lutvin v. Dopkus,* 94 N.J.L. 64, 108 Atl. 862; *Fazzioni v. Weiss,* 99 N.J.L. 157, 122 Atl. 840.

The negligence necessary to impose liability upon a host who is transporting a "guest-licensee" must be gross or wanton. This is substantially different from ordinary negligence and has been defined as follows:

> "The emphasis is upon the reckless indifference to consequences of the intentional act of driving the motor vehicle in the face of known circumstances presenting a high degree of probability of producing harm."

State v. Lewis, 11 N.J. 217, 94 A. 2d 328; *King v. Patrylow,* 15 N.J. Super. 429, 83 A. 2d 639; *State v. Oliver,* 37 N.J. Super., 379, 117 A. 2d 404.

NEW MEXICO

The acts or conduct which constitute heedlessness and reckless disregard of the rights of others mean wanton misconduct. *Fowler v. Franklin,* 58 N.M. 254, 270 P. 2d 389.

The state of mind which must be shown is not unlike that required to secure a conviction for involuntary manslaughter. *Carpenter v. Yates,* 58 N.M. 513, 273 P. 2d 373; *DeBlassie v. McCrory,* 60 N.M. 490, 292 P. 2d 786.

The state of mind required is usually inferred from more than one circumstance. The driver's falling asleep is not alone sufficient. *DeBlassie v. McCrory, supra.* Speed by itself is not more than ordinary negligence. *Smith v. Meadows,* 56 N.M. 242, 242 P. 2d 1006. But speed coupled with intoxication and a known dangerous highway, *Gomez v. Rodriguez,* 62 N.M. 274, 308 P. 2d 989, or the forcing of other drivers off the road and disregard of passengers' warnings, *Potter v. Wilson,* 64 N.M. 211, 326 P. 2d 1093, satisfies the standard of the statute.

By inference, the provisions of the guest statute apply in a wrongful death action arising out of a passenger's death. *Berkstresser v. Voight,* 63 N.M. 470, 321 P. 2d 1115. The New Mexico wrongful death statute requires circumstances which would "if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof * * *", Sec. 22-20-2, N.M. Statute 1953. But see, *Gomez v. Rodriguez, supra.*

NORTH DAKOTA

For a social guest to recover there must be gross negligence; however, a business guest need only show ordinary negligence. Where a substantial benefit is conferred upon the owner, driver or person responsible for the operation of the motor vehicle, that guest is a business guest. *Bentley v. Oldetyme,* 71 N.D. 52, 298 N.W. 417; *Ledford v. Klein,* N.D., 87 N.W. 2d 345.

A servant or agent has no implied authority to invite a guest to ride in a motor vehicle in his charge so as to impose liability upon the master and owner for injuries to the guest. *Erickson v. Foley,* 65 N.D. 737, 262 N.W. 177.

In determining gross negligence, every act or omission to act entering into the particular happening or occurrence must be considered with all of the surrounding circumstances. *Rubbelke v. Jacobson,* 66 N.D. 27, 268 N.W. 873.

Gross negligence is generally a question of fact for the jury. *Henke v. Peyerl,* N.D., 89 N.W. 2d 1.

Failure to stop and yield the right of way for an arterial highway may be sufficient proof to support a finding of gross negligence. *Henke v. Peyerl, supra.*

Liquor alone is not sufficient, but the guest must establish intoxication. *Stackfeld v. Sayre,* 69 N.D. 42, 283 N.W. 788.

The action of the owner in permitting a minor to use the vehicle is not gross negligence per se. *Posey v. Krogh,* 65 N.D. 490, 259 N.W. 757.

Speed of itself is not gross negligence unless there are additional attending circumstances. *Rubbelke v. Jacobson, supra; Jacobs v. Nelson,* 67 N.D. 27, 268 N.W. 873; *Anderson v. Anderson,* 69 N.D. 229, 285 N.W. 294.

OHIO

"Wanton misconduct" has been normally interpreted as being substantially synonymous with "cussedness" and its precise definition has been repeated in many cases, *U.C. Pipe Company v. Bassett,* 130 O.S. 567, 200 N.E. 843 to *Lombardo v. DeShance,* 167 O.S. 431, 149 N.E. 2d 914, as follows: "Wanton misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury."

The mental attitude of the defendant is largely determinative of whether the conduct was wanton, and frequently that determination is based on the testimony of the defendant himself. In *Helleren v. Dixon,* 152 O.S. 40, 86 N.E. 2d 777, defendant's testimony that he "just took a chance" in driving three hundred feet without being able to see, with the accelerator down to the floor and half of that distance off the pavement on the berm until he hit a culvert, was held not to be wanton misconduct. Where a driver approached an intersection at a high rate of speed, saw another car approaching from his right, looked at baggage on his running board and then at his watch, failed to see the traffic light, and then accelerated to "beat" the other car, he was not guilty of wilful and wanton misconduct. *Murphy v. Snyder,* 63 O.App. 423, 27 N.E. 2d 152. But in

Jenkins v. Sharp, 140 O.S. 80, 42 N.E. 2d 755, defendant's testimony that he knew of the presence of a stop sign at a dangerous intersection, when coupled with plaintiff's testimony that defendant crashed the stop sign at a speed of fifty miles per hour, was held to constitute wanton misconduct (though defendant testified he stopped at the sign).

Speed alone is not sufficient to establish wanton misconduct, *Akers v. Stirn,* 136 O. S. 245, 25 N.E. 2d 286; but speed coupled with knowledge of an imminent, dangerous situation may be. Similarly, with intoxication. *White v. Harvey,* 170 O.S. 262; *Zalewski v. Yancey,* 101 O.App. 501, 140 N.E. 2d 592.

Failure of a driver to heed protests of guests has been held wilful or wanton misconduct. *Kennard v. Palmer,* 143 O.S. 1, 53 N.E. 2d 908; *Tighe v. Diamond,* 149 O. S. 520, 80 N.E. 2d 122.

OREGON

Intoxication is defined by the court as "being under the influence of intoxicating liquor to such an extent as to materially affect a driver's ability to operate a motor vehicle or to tend to prevent him from exercising the care and caution which a sober and prudent person would have exercised under the same circumstances." *Glascock v. Anderson,* 198 Ore. 499, 257 P. 2d 617; *Fossi v. George,* 191 Ore. 113, 228 P. 2d 798; *Willoughby v. Driscoll,* 168 Ore. 187, 120 P. 2d 768. When a defendant's conduct is within this definition, he cannot avail himself of the guest statute.

Perhaps the most considered definition of gross negligence appears in *Rauch v. Stecklein,* 142 Ore. 286, 20 P. 2d 387, where the court said gross negligence is "conduct which indicates an indifference to the probable consequences of the act. A motor host who drives in a manner which indicates that he has no concern for consequences and an indifference to the rights of others is said to be guilty of gross negligence." This definition was followed in *Carlson v. Wagberg,* 183 Ore. 95, 198 P. 2d 926, and expanded upon in *Keefer v. Givens,* 191 Ore. 611, 232 P. 2d 808. There the court stated that gross negligence is "generally revealed in conduct of a continuing kind as distinguished from something which happened without the volition of the defendant rather quickly * * *." "Inadvertence, thoughtlessness, brief inattention, error in judgment and momentary loss of presence of mind" are insufficient. Accord, *Whang v. Houglum,* 206 Ore. 125, 298 P. 2d 185.

Two recent cases follow generally the definition contained in the *Rauch* case. *Gonzales v. Curtis,* 68 Adv. Sh. 891, 339 P. 2d 713; *Reese v. Bridgmon,* 68 Adv. Sh. 1013, 340 P. 2d 573.

SOUTH CAROLINA

One of the earliest cases and the leading case in South Carolina interpreting the South Carolina guest statute is the case of *Fulghum v. Bleakley,* 177 S.C. 286, 181 S.E. 30. The South Carolina guest statute was taken verbatim from a Connecticut statute on the same subject, and the South Carolina court said that in doing this the legislature had undoubtedly intended to adopt the interpretation placed on the statute by the Connecticut court. Quoting rather extensively from a Connecticut case, the South Carolina court said that the adoption of the statute meant that the legislature intended to make some change in the law of negligence, so that in order to sustain liability of any owner or operator of a motor vehicle to a guest there would have to be something more than the mere failure of an ordinary and reasonably prudent man to use due care. In a bit of judicial juggling of words the South Carolina court said that the statute means "or caused by his heedless and his reckless disregard of the rights of others", thus taking the word "heedlessness" and making an adjective out of it and substituting the word "and" for the word "or" after the word "heedlessness" in the statute. The court went on to say, "Heedless in this connection means careless * * *. Act or conduct in reckless disregard of the rights of others is improper or wrongful conduct, and constitutes wanton misconduct, evincing a reckless indifference to consequences to the life, or limb, or health, or reputation or property rights of another." This last quotation was taken from the Connecticut case which the South Carolina court adopts as law in South Carolina.

Spurlin v. Colprovia Products Company, 185 S.C. 449, 194 S.E. 332, again quotes the language of the *Fulghum* case, and the court reiterates that this is the interpretation of the statute in South Carolina.

Cummings v. Tweed, 195 S.C. 173, 10 S. E. 2d 322, again quotes the *Fulghum* case, and the court went on to say that heedlessness was the equivalent of mere negligence,

and the statute meant to impose liability for something more than mere negligence.

Peat v. Fripp, 195 S.C. 324, 11 S.E. 2d 383, quotes from the *Cummings* case. It will thus be seen that the original rule laid down by the South Carolina court in the *Fulghum* case has been followed repeatedly throughout later decisions and the interpretation placed on the statute by the South Carolina court has not been varied. The court has said that heedlessness means nothing more than mere negligence and, since the statute meant to impose liability for something more than mere negligence, the court has read "heedless and reckless" together, so that in effect we have liability of an owner or operator of a motor vehicle to a guest only in the case of intentional misconduct or of reckless misconduct.

This fact appears very clearly from the very recent case of *Jackson v. Jackson,* 234 S.C. 291, 108 S.E. 2d 86. The court there said, "As construed by this court, the South Carolina guest statute restricts liability to a guest to cases where injury has resulted from either intentional or reckless misconduct of the owner or operator of the motor vehicle." Intentional misconduct, as defined by the South Carolina court is that conduct that is wilful, purposeful or designed. The definition of reckless misconduct is contained in the *Fulghum* case and a judge's charge to the jury that contains the language of the *Fulghum* case has been upheld in South Carolina as a correct statement of the law under the guest statute.

The South Carolina court is extremely liberal in saying what allegations in a complaint will withstand demurrer and what evidence is necessary in order to take the case to the jury. After reading many of the cases, some question may be posed as to just how much change this statute has made in the law of negligence, for where the case is close at all the court will usually let it go to the jury under facts that are normally thought of to constitute only mere negligence. In the case of *Benton v. Pellum,* 232 S.C. 26, 100 S.E. 2d 534, the court said that recklessness could consist of failing to keep a proper lookout, failing to have the car under control, and in driving at an excessive rate of speed. Thus, allegations in substantially this form will sustain a cause of action under the South Carolina guest statute. These allegations are the ones that usually appear in ordinary negligence complaints. The court went on to say that recklessness need not be the sole cause of the accident, but that it is sufficient to show that it is a proximate concurring cause.

In the case of *Benton v..Pellum, supra,* suit was brought by a guest under the South Carolina guest statute. The guest was asleep in the car prior to and during the time of the accident so there was no issue of contributory recklessness. A car was situated across the highway at right angles and was struck by the car in which the guest was riding. The evidence was conflicting as to the speed of the car, but it was figured to be excessive, one witness stating that it was around seventy to seventy-five miles per hour. Evidence at the scene of the accident showed skid marks for over a distance of nine feet before the impact. The court let this case go to the jury as to whether or not the operator of the vehicle was guilty of reckless misconduct.

In *Saxon v. Saxon,* 234 S.C. 378, 98 S.E. 2d 803, a man was hauling some materials on a truck, the truck having a very weak, slick tire. The operator of the truck had placed the tire on the truck earlier in the morning and knew of its weakened condition. He was driving the truck down the road at a very high rate of speed, the guest testifying somewhere between seventy and seventy-five miles an hour. The guest repeatedly warned the operator to slow down. While turning the truck around a curve the load in the truck shifted over to the side where the weak tire was and the operator of the truck stated that when the load shifted, he knew that the situation would become more dangerous. The operator also stated on the stand that he "knew he was taking a risk". Again the court let this case go to the jury.

Meek v. Harris, 256 F. 2d 579, was a diversity case arising under the South Carolina guest statute. The evidence showed that the car was going between seventy and seventy-five miles per hour. Other evidence as to speed was conflicting. The court let this case go to the jury on the issue of recklessness.

In the case of *Oswald v. Weiner,* 218 S. C. 206, 62 S.E. 2d 311, the court said that the South Carolina guest statute did not change the existing laws on the doctrine of respondeat superior.

SOUTH DAKOTA

For a guest to recover, there must be wilful and wanton misconduct of the owner or operator. This has been held to be something more than negligence and is conduct in the nature of a deliberate and intentional wrong. Both the Code and the decisions follow Michigan precedent. *Melby v. Anderson,* 64 S.D. 249, 266 N.W. 135.

Driving ninety-five miles an hour, over the guest's objection, is enough for a jury to find for the guest. *Allen v. McLain,* 74 S.D. 646, 58 N. W. 2d 232. Similarly, where the defendant drove recklessly with guests standing on the running board. *Stoll v. Wagaman,* 73 S.D. 186, 40 N.W. 2d 393. Applying brakes at high speed on icy roads might make a jury question. *Elfert v. Witt,* 73 S.D. 4, 38 N.W. 2d 445.

Having a blackout spell is not wilful negligence even though the driver had had such spells for fifteen years but never before while driving. *Espeland v. Green,* 74 S.D. 484, 54 N.W. 2d 465. Falling asleep is wilful negligence if there was such prior warning that continuing to drive constitutes reckless disregard of the consequences. *Antonen v. Swanson,* 74 S.D. 2, 48 N.W. 2d 161.

Knowledge that tires were worn did not make a jury question in *Wakefield v. Singletary,* 76 S.D. 417, 80 N.W. 2d 84. Permitting a slightly experienced twelve and one-half year old daughter to drive was not wilful negligence on the part of the owner in *Ortman v. Smith,* 198 F. 2d 123. It is not simply the failure to negotiate one turn or the single item of speed, but the whole attitude of the defendant and all of the circumstances and conditions which indicate the state of mind of the defendant. *Berlin v. Berens,* 76 S.D. 429, 80 N.W. 2d 79. A sixteen year old girl driving fifty to sixty miles per hour on some loose gravel was not wilfully negligent when she lost control. *Chernotik v. Schrank,* 76 S.D. 374, 79 N.W. 2d 4.

TEXAS

Article 6701b of the Revised Civil Statutes imposes liability on the owner or operator to a guest if the accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others. It is held that by the terms "heedlessness or his reckless disregard of the rights of others", as used in the statute, is meant the same as is meant by "gross negligence".

There must be a conscious indifference. Mere momentary thoughtlessness, inadvertence or error of judgment is not sufficient to establish liability of the host to a guest. *Rogers v. Blake,* 150 Tex. 373, 240 S.W. 2d 1001. Thus, the mere failure to stop at a stop sign or at a red traffic signal is not sufficient to establish gross negligence. *Rogers v. Blake, supra; Hernadez v. Castillo,* Tex. Civ. App., 303 S.W. 2d 508. On the other hand, in *Fancher v. Caldwell,* Tex., 314 S.W. 2d 820, it was held that there was sufficient evidence to support a finding of gross negligence where the defendant host had backed his automobile onto a divided highway at night without his headlights on and drove east on the west-bound lanes of traffic.

Speed alone is not gross negligence. *Bowman v. Puckett,* 114 Tex. 125, 188 S. W. 2d 571; *Burt v. Lochausen,* 151 Tex. 289, 249 S. W. 2d 194. Coupled with other factors such as the character of the road, the character of the neighborhood, the condition of the automobile and whether or not the driver was warned of excessive speed, speed may constitute gross negligence. *Bowman v. Puckett, supra; Burt v. Lochausen, supra; Bernal v. Seitt,* Tex., 313 S.W. 2d 520.

However, even with some of those factors present, such conduct has in other cases been held insufficient to establish gross negligence. *Gill v. Minter,* Tex. Civ. App., 233 S.W. 2d 585; *Webb v. Karsten,* Tex. Civ. App., 308 S.W. 2d 114; *Bruton v. Shinault,* Tex. Civ. App., 314 S.W. 2d 143.

Whether or not falling asleep at the wheel may be gross negligence depends upon whether the driver has warning of the likelihood that he might go to sleep. *Napier v. Mooneyham,* Tex. Civ. App., 94 S. W. 2d 564; *McMillan v. Simms,* Tex. Civ. App., 112 S.W. 2d 793; *Wood v. Orts,* Tex. Civ. App., 182 S.W. 2d 139.

UTAH

Under Utah Code Annotated, 1953, Sec. 41-9-1, a guest does not have any right against the owner or driver of a car unless the driver or owner is intoxicated or guilty of wilful misconduct, and the burden of proving that such intoxication or wilful misconduct was the proximate cause is upon the plaintiff.

In *Stack v. Kearnes,* 118 Utah 237, 221 P. 2d 594, the court approved the following definitions of wilful misconduct "* * * the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. It involves deliberate intentional or wanton conduct in doing or omitting to do an act with knowledge or appreciation that injury is likely to result therefrom." Also, "* * * wilful misconduct connotes a greater wrongdoing than mere negligence or even gross negligence. It includes a conscious or intentional violation of definite law or rule of conduct with the knowledge of the peril to be apprehended from such act or failure to act." The court said that the jury could certainly find that the defendant's "stunt driving" (accelerating and braking at the same time) constituted such conduct, especially after he barely made the first curve and merely laughed off the plaintiff's request to proceed more cautiously.

In *Ricciuti v. Robinson,* 2 Utah 2d 45, 269 P. 2d 282, the court held that the driver was not guilty of wilful misconduct when a lighted cigarette fell out of his mouth into the folds of his clothing and, in attempting to rid himself of it, he lost control of the car. This was true even though defendant was driving sixty miles per hour in a residential section of town. The court held that a reasonable person could not conclude that the driver intentionally did or failed to do an act within the definition from the *Kearnes* case.

VERMONT

In the case of a gratuitous guest, it is necessary to allege and prove gross or wilful negligence in order for the guest passenger to recover. If the passenger is a passenger for hire, it is necessary to allege and prove only ordinary negligence. Gross negligence can not be tested by prior decisions, the supreme court having stated that there is no current rule by which the existence of gross negligence can be determined, for each case must be judged according to its own facts. *Hastings v. Murray,* 112 Vt. 37, 20 A. 2d 107.

Gross negligence may be evolved through or by a combination of factors, no one of which in itself is sufficient to impose liability. *Kerin b.n.f. v. Coates,* 112 Vt. 466, 28 A. 2d 382.

The supreme court early in its decisions distinguished between ordinary, gross and wilful negligence. *Sorrell v. White,* 103 Vt. 277, 153 Atl. 359. It there held that gross negligence is lesser in degree than wilful negligence, although higher in magnitude than simple negligence. Because it is necessary then to prove only gross negligence in order for a gratuitous guest to recover, the question of wilful negligence does not arise.

There must be more than an error in judgment, momentary inattention or loss of presence of mind in circumstances such as to indicate an indifference to the duty owed to a guest or an utter forgetfulness of his safety, in order to uphold a finding of gross negligence. *Anderson v. Olson,* 106 Vt. 70, 169 Atl. 781.

Sleep, if it was likely to come and the defendant knew or ought to have known that fact, permits a finding of gross negligence. *Steele v. Lackey,* 107 Vt. 192, 177 Atl. 309.

Speed and lack of proper control would make for gross negligence because it would be said then there was an indifference to the driver's duty to his guests or an utter forgetfulness of the guests' safety. *Ellison v. Colby,* 110 Vt. 431, 8 A. 2d 637.

It is held that the mere fact that a motor vehicle skids does not of itself constitute negligence, nor does it necessarily follow that there would be a departure from the normal course because of the high rate of speed, but from the physical facts where it could be shown there was great speed, which caused the loss of control, and which caused the car to skid, gross negligence should be found. *Abel v. Salebra,* 115 Vt. 336, 61 A. 2d 605.

VIRGINIA

Gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. There is no sharp well-defined dividing line between simple negligence and gross negligence. The distinction is one of degree. The courts have also used other expressions in defining gross negligence. The question is generally for the jury. *Alspaugh v. Diggs,* 195 Va. 1, 77 S.E. 2d 362 (contains collection of cases); *Ketchmark v. Lindauer, Admr.,* 198 Va. 42, 92 S.E. 2d 286.

Wanton negligence is reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another, whereas wilful negligence implies an act intentionally done, or omitted, in disregard of another's rights. *Boward v. Leftwich,* 197 Va. 227, 89 S.E. 2d 32.

Gross negligence was held to have been shown in the following cases; wrong side of road, *Collins v. Robinson,* 160 Va. 520, 169 S.E. 609; speed, *Yorke v. Cottle,* 173 Va. 372, 4 S.E. 2d 372; failure to avoid collision, *Margiotta v. Aycock,* 162 Va. 557, 174 S.E. 831; failure to keep proper lookout, *Yonker v. Williams,* 169 Va. 294, 192 S.E. 753; falling asleep while driving, *Smith v. Smith,* 199 Va. 55, 97 S.E. 2d 907; failure to heed guest's protest, *Worcester v. McClurkin,* 174 Va. 221, 5 S.E. 2d 509; intoxication of operator, *Wolfe v. Lockhart,* 195 Va. 479, 78 S.E. 2d 654.

Gross negligence was held *not* to have been shown in these cases: failure to operate skillfully, *Young v. Dyer,* 161 Va. 43, 170 S.E. 737; vehicle running off hard surface or striking object, *Sibley v. Slayton,* 193 Va. 470, 69 S.E. 2d 466; physical evidence not conclusive, *Keen v. Harman,* 183 Va. 670, 33 S.E. 2d 197; failure of mechanism to function, *Tarrall v. Tarrall,* 161 Va. 663, 171 S.E. 500.

Deliberate inattention was discussed and the Massachusetts rule was considered in *Lloyd v. Green,* 194 Va. 948, 76 S.E. 2d 190, and *McDowell v. Dye,* 193 Va. 390, 69 S.E. 2d 459.

The cumulative effect of acts of ordinary negligence may constitute gross negligence. *Garst v. Obenchain,* 196 Va. 664, 85 S.E. 2d 207.

As to evidence establishing gross negligence as a matter of law, see *Wolfe v. Lockhart, supra.*

WASHINGTON

Prior to 1957 amendment to the statute, Laws of 1957, C. 132 Sec. 1, recovery by a guest was limited to situations in which the owner or driver intentionally inflicted injury on the guest occupant. Recovery was impossible as a practical matter due to the difficulty of proof. Consequently, only one case involved the question of what constitutes intentional conduct under the statute. *Parker v. Taylor,* 196 Wash. 22, 81 P. 2d 806. The remaining cases represented attempts to escape application of the statute. The amendment added two grounds for imposing liability on the owner or driver. These were intoxication and gross negligence.

The first case to reach the Washington Supreme Court since the amendment in *Lambert v. Smith,* 154 Wash. Dec. 424, 340 P. 2d 774, in which the plaintiff sought to recover on the ground of intoxication. Since there have been no decisions involving gross negligence, it is difficult to predict how the Washington court will define this nebulous phrase in order to determine if the statute has application.

The Court has held that the 1957 amendment did not operate retrospectively. See the case of *Nogosek v. Truedner,* 154 Wash. Dec. 940; 344 P. 2d 1028. Here the cause of action arose prior to the 1957 amendment but the case came to trial after the amendment, so the case was governed by the 1937 act.

WYOMING

Sec. 31-233, Wyoming Statutes Annotated, 1957, states that no person transported as a guest without payment for such transportation shall have a cause of action for damages, unless the accident was caused by gross negligence or wilful and wanton misconduct which contributed to the injury for which the action is brought.

In *Mitchell v. Walters,* 55 Wyo. 298, 100 P. 2d 102, the following definition was approved: "gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of possible consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure." The court found that momentary misjudgment was not gross negligence and certainly not wilful and wanton misconduct.

This case was approved and followed in *Hawkins v. L. C. Jones Trucking Co.*, 68 Wyo. 275, 232 P. 2d 1014, in which the court held that skidding into the path of a truck on a wet highway, while trying to avoid the danger, could not constitute gross negligence.

The *Hawkins* case was approved in *Arnold v. Jennings*, 75 Wyo. 463, 296 P. 2d 989, in which the court found no evidence of gross negligence when defendant failed to make a curve on a rather poor road.

In *Meyer v. Culley*, 68 Wyo. 285, 241 P. 2d 87, the court said "while it is generally true that mere speed of itself does not constitute 'wilful misconduct' yet there may be a point at which speed became so excessive, that the danger of injury to a guest was probable at such extreme speed, and that it might constitute 'wilful misconduct'. Needless to say the circumstances appearing in each case must rule this point." In *Hoffman v. Buckingham Transport* Co., 98 F. 2d 916, the court also held that excessive speed in and of itself was not gross negligence, nor wilful and wanton misconduct.

In *Flint v. Voiles*, 50 Wyo. 43, 58 P. 2d 443, the court refused to rule on whether driving on a tire, known to be in unsafe condition, constituted gross negligence, or wilful and wanton misconduct.

PART IV

Guest's Conduct As A Defense Available To Owner or Driver

ALABAMA

An owner or driver may plead contributory negligence or assumption of risks in a case against him where the guest statute does not apply. However, where a wanton or wilful act is involved contributory negligence is no defense. *Zemcaoner v. McElroy*, 264 Ala. 258, 86 So. 2d 824.

Assumption of risk is no defense where a case is under the guest statute. The fact that a person may have appreciated the danger of riding as a guest in defendant's automobile in view of the defendant's drunken condition, would not be a defense under the Alabama guest statute. *Day v. Downey*, 256 Ala. 587, 56 So. 2d 656.

If wilful or wanton conduct can be imagined on the part of a "guest" it would not be a defense available to the defendant driver as "wanton contributory negligence of the plaintiff would not justify the defendant in wantonly injuring him." *Davis v. Smithman*, 209 Ala. 244, 69 So. 2d 208 (Not a guest case).

ARKANSAS

Contributory negligence of the guest is a defense, but normally this is a question for the jury. Where the driver had been drinking, whether the plaintiff was guilty of contributory negligence in continuing to ride with him depended upon whether the plaintiff knew or in the exercise of ordinary care should have known that the defendant was so intoxicated as to make him a careless or incompetent driver. *Scott v. Shairrich*, 225 Ark. 59, 259 S.W. 2d 39.

The jury may consider the relationship between the guest and the driver in determining whether the guest was negligent in failing to protest. *Harkrider v. Cox*, Ark., 321 S.W. 2d 226.

CALIFORNIA

In an action for personal injuries sustained by a guest while riding in defendant's automobile, the negligence of plaintiff guest is ordinarily not available as a defense to a charge of wilful misconduct, but may become so only where the act of plaintiff is such that it is a part of or an inducing cause of defendant's disconduct. *Amidon v. Hebert*, 93 Cal. App. 2d 255, 208 P. 2d, 733.

The rule in California with respect to a passenger's duty, as applied to the question of his contributory negligence, has been stated as follows in *Welding v. Norton*, 156 Cal. App. 2d, 374, 380, 319 P. 2d 440, where the court said:

> "With respect to the passenger's duty in the matter of speed and the question of contributory negligence, the correct rule would be that if he knew, or in the exercise of ordinary care would have known, that the car was being operated at an unreasonably high or imprudent speed, and voiced no objection, he would be guilty of contributory negligence, and

if such negligence contributed in any degree to the accident he could not recover."

As to intoxication, it was held in *Enos v. Montoya,* 158 Cal. App. 2d, 394, 322 P. 2d 472, that a guest who knows that his host has been drinking will be precluded from recovery when he has sufficient knowledge so that he knows or should have known that his host is incapable of careful driving, or has participated in drinking activities so as to be in equal fault with the host.

COLORADO

A guest has a duty to warn of known dangers and protest against driving in a reckless and dangerous manner to the extent a prudent person would, and failure to do so precludes recovery. Such questions should be submitted to jury under proper instructions. *Ling v. Tease,* 123 Colo. 518, 232 P. 2d 189.

Entering a car driven by a person known to be intoxicated makes a guest guilty of contributory negligence and assumption of risk, and precludes recovery. *Haller v. Gross,* 135 Colo. 218, 309 P. 2d 598. A guest has a duty to leave a vehicle being operated in a wilful and wanton manner at the first opportunity, *Local Union No. 55 v. Salter,* 114 Colo. 513, 167 P. 2d 954.

DELAWARE

Assumption of the risk is a jury question which, it seems, may bar recovery even where "wilful or wanton misconduct" has been found. *Gerhauser v. Deemer,* 49 Del. 328, 116 A.2d 175.

The decisions are silent regarding contributory negligence.

FLORIDA

Assumption of risk or contributory negligence are good defenses and are most frequently invoked when the plaintiff has knowledge of the driver's intoxication or participates in it. *Henley v. Carter,* Fla., 63 So. 2d 192; *Smart v. Masker,* Fla., 113 So. 2d 414. The plaintiff is also barred if he goes to sleep knowing the unsavory condition of the defendant. *Herring v. Eiland,* Fla., 81 So. 2d 645.

An oft-cited Florida case on the duty of the guest generally is *Knudsen v. Hanlan,* Fla., 36 So. 2d 192.

A person may be a trespasser while in or on the automobile as in *Byers v. Gunn,* Fla., 81 So. 2d 722, by hanging on the fender, and may be guilty of assumption of risk.

Where passenger makes no warning other than, "Take it easy", his contributory negligence is usually a jury question. *Huffman v. Peek,* Fla., 102 So. 2d 641. Also, if some doubt as to whether the passenger actually knew the driver was intoxicated. *Welch v. Moothart,* Fla., 89 So. 2d 485.

GEORGIA

Two classifications of negligence affect the guest's recovery, contributory negligence and comparative negligence. Comparative negligence may defeat recovery or reduce the amount recovered. Both classes are applicable in guest passenger actions. Comparative negligence by judicial construction arises from Georgia Code Annotated, 105-603, defining contributory negligence. *Whatley v Henry,* 65 Ga. App. 668, 16 S.E. 2d 214; *Smith v. American Oil Company,* 77 Ga. App. 46, 49 S.E. 2d 90; *Wilson v. Harold,* 87 Ga. App. 793, 75 S.E. 2d 436.

Knowledge of the host's intoxication can defeat recovery but will not if condition unknown before becoming guest. *Stephenson v. Whitten,* 91 Ga. App. 110, 85 S.E. 2d 165; *Staples v. Brown,* 96 Ga. App. 176, 99 S.E. 2d 526; *Mann v. Harmon,* 62 Ga. App. 231, 8 S.E. 2d 549; *Williams v. Owens,* 85 Ga. App. 549, 69 S.E. 2d 787.

If the host falls asleep a jury issue is usually presented on gross negligence. *Blount v. Spears* and *Spears v. Southern Bell Telephone & Telegraph Co.,* 93 Ga. App. 623, 92 S.E. 2d 573; *Conklin v. Jones,* 95 Ga. App. 677, 98 S.E. 2d 638.

Most questions of gross negligence, contributory negligence and comparative negligence present jury issues. Rarely does the court rule as a matter of law. *Conklin v. Jones, supra.*

IDAHO

No cases were found dealing with assumption of risk as a defense. It has been held that ordinary contributory negligence is not a defense to a suit based upon "reckless disregard" under the guest statute. *Loomis v. Church,* 76 Idaho 74, 277 P. 2d 561. The court implied in this case that a guest's conduct may amount to "gross" as distinguished from "ordinary" contributory negligence, which would preclude his

recovery even upon a showing of the driver's "reckless disregard."

ILLINOIS

Generally it may be stated that a guest takes his host's automobile as he finds it and assumes the risk of latent mechanical defects, *Bartolucci v. Falleti,* 382 Ill. 168, 46 N.E. 2d 980; but a guest is only required to exercise such care is the exigencies of the situation require. *Dees v. Moore,* 335 Ill. App. 318, 81 N.E. 2d 772. Contributory wilful and wanton misconduct of a guest is a complete defense to an action against the driver, *Lana v. Bobis,* 340 Ill. App. 10, 91 N.E. 2d 106; mere contributory negligence of guest, however, is no defense to a charge of wilful and wanton misconduct on the part of the driver, *Smidt v. Anderson,* 301 Ill. App. 28, 21 N.E. 2d 825; but a guest has the duty to exercise due care for his own safety and failing in that duty cannot recover for an injury to which his own negligence has contributed, *Truchobuk v. Dillon,* (no state citation) 91 N.E. 2d 166. A guest is not guilty of contributory negligence merely because he says or does nothing at the time of or immediately before an accident, *Lasko v. Meier,* 327 Ill. App. 5, 63 N.E. 2d 531; but he is under a duty to warn the driver of approaching danger, *Walker et ux. v. Illinois Commercial Telephone Co. et al.,* 315 Ill. App. 553, 43 N.E. 2d 412; *Hohimer v. Fricke,* 317 Ill. App. 372, 46 N.E. 2d 169.

INDIANA

A guest who voluntarily takes a chance on known dangers assumes the risk and must bear the consequences if he is injured by reason of a known danger. *Pierce v. Clemens,* 113 Ind. App. 65, 46 N.E. 2d 836. Assumption of risk is not to be confounded with contributory negligence which, unless amounting to wilful or wanton misconduct on the part of the guest, is not a defense to an action under the statute. *Pierce v. Clemens, supra.* If there is evidence that the guest has assumed the risk, the issue is properly submitted to the jury. *Ridgway v. Yenny,* 223 Ind. 16, 57 N.E. 2d 581. If, however, there is no real dispute in the evidence on that issue, it is for the court to say whether the guest had assumed the risk. *Pierce v. Clemens, supra.* The burden of proving wanton or wilful misconduct on the part of the guest rests upon the defendant. *Ridgway v. Yenny, supra.*

IOWA

Plaintiff's assumption of risk is an affirmative defense and the burden is on the defendant to establish it. One becoming a guest in an automobile with knowledge that the driver is intoxicated acquiesces in his operation of the automobile and assumes the risk of the resulting accident, *Augusta v. Jensen,* 241 Iowa 697, 42 N.W. 2d 383; and further it was held where the automobile guest entered the automobile and he knew or should have known that the driver was intoxicated, there can be no recovery for any resulting injury or death of the guest. *Booth v. General Mills,* 243 Iowa 206, 49 N.W. 2d 561; *Evans v. Holsinger,* 242 Iowa 990, 48 N.W. 2d 250.

The defense of decedent's assumption of risk was properly stricken and dismissed in the absence of evidence that the decedent knew of the driver's claimed intoxication or had any time for deliberation at the time of or immediately before the accident and could then assert a choice as to continuing in the automobile. *Thornbury v. Maley,* 242 Iowa 70, 45 N. W. 2d 576.

KANSAS

The automobile guest statute does not require a guest suing a motorist to allege that the guest exercised due care for his own protection. The failure of an automobile guest suing a motorist for injuries to exercise reasonable care for his own protection is a proper defense if raised by a motorist, and is a form of contributory negligence. *Leabo v. Willett,* 162 Kan. 236, 175 P. 2d 109.

See *Naglo v. Jones,* 115 Kan. 140, 222 Pac. 116, and *Sharp v. Sproat,* 111 Kan. 735, 208 Pac. 613, 26 A.L.R. 1421, as to duty of guest to warn driver.

MASSACHUSETTS

Assumption of risk and contributory negligence are questions of fact in Massachusetts. If proven, they bar recovery unless the defendant was guilty of wilful, wanton and reckless misconduct. *LeSaint v. Weston,* 301 Mass. 136, 16 N.E. 2d 631.

Knowledge of the defendant's intoxication, protests against improper driving, even though the plaintiff has had a subsequent opportunity to leave the automobile, do not constitute contributory negligence as a matter of law, if the defendant

promised to behave, *Dean v. Bolduc,* 296 Mass. 15, 4 N.E. 2d 441; *McGaffigan v. Kennedy,* 302 Mass. 12, 18 N.E. 2d 344.

If the plaintiff deliberately went to sleep despite knowledge of careless driving, the plaintiff would be guilty of contributory negligence as a matter of law. *O'Brien v. Jenelle,* 321 Mass. 316, 73 N.E. 2d 460.

MICHIGAN

As a general rule a passenger has no duty to make any observation or warn the driver of danger. *Yarabek v. Brown,* 357 Mich. 120, 97 N.W. 2d 797. The guest does not assume the risk of injury. *Davis v. Hollowell,* 326 Mich. 673, 40 N.W. 2d 641 (guest knew driver had been drinking).

MONTANA

Assumption of risk and contributory negligence are usually questions of fact in Montana.

Knowledge of the driver's drinking, where there was no evidence tending to show effect on his ability to drive the car, was no defense. *Westergard v. Peterson,* 117 Mont. 550, 159 P. 2d 518.

Contributory negligence is defined as want of ordinary care. *Wolf v. Barry O'Leary Inc.,* 132 Mont. 468, 318 P. 2d 582, 585.

Failure to warn of danger is not contributory negligence unless the guest knows of danger and also knows that the driver is not taking proper precaution. *Baatz v. Noble,* 105 Mont. 59, 69 P. 2d 579; *Laird v. Berthelote,* 63 Mont. 122, 206 Pac. 445.

A question of fact is presented as to failure to warn where there was a short interval of time between danger signals and actual dangerous spot in road. *Baatz v. Noble, supra.*

Dangerous crossing, pavement slippery, windshield somewhat frosted, all of which guest knew, make him guilty of contributory negligence a matter of law. He should have driver stop and investigate. *Incret v. Chicago M. St. P. & P. R. Co.* 107 Mont. 394, 86 P. 2d 12. Guest was guilty of contributory negligence as a matter of law where he is approaching a railroad crossing which is a known place of danger and fails to warn. *Grant v. Chicago M. & St. Paul Ry. Co.,* 78 Mont. 97, 252 Pac. 382; *Sherris v. Northern Pac. Ry. Co.,* 55 Mont. 189, 175 Pac. 269.

NEBRASKA

Nebraska has adopted a comparative negligence statute. Neb. Rev. Stat., Sec. 25-1151 (Reissue 1948). Ordinarily, the guest passenger has a right to assume that the driver is a reasonably safe and careful driver and the duty to warn does not arise unless some fact or situation out of the usual and ordinary is present. *Bartek v. Glasers Provisionals,* 160 Neb. 794, 71 N. W. 2d 466; *Erickson v. Morrison,* 152 Neb. 133, 40 N.W. 2d 413.

A guest has the duty to use care in keeping a lookout commensurate with that of an ordinarily prudent person in like circumstances. This is not the same degree of care as rests on the driver. If the guest does perceive danger he should warn the driver, but he need not watch the road or advise in the management of the automobile. *Bartek v. Glasers Provisionals, supra.*

NEVADA

No Nevada cases have been found under this heading.

NEW JERSEY

In general terms, a passenger is bound to exercise for his own safety the care of a reasonably prudent person under the circumstances. *Ambrose v. Cyphers,* 29 N.J. 138, 148 A.2d 465.

A passenger need not anticipate that the driver, who has exclusive control and management of the vehicle, will enter a sphere of danger, omit to exercise proper care to observe the approach of other vehicles, or fail to keep the speed of the vehicle within proper limits, or otherwise improperly increase the common risks of travel. *Folicki v. Camden County Beverage Co.,* 131 N.J. L.590, 37 A.2d 858; *Tobish v. Cohen,* 110 N.J.L. 296, 164 Atl. 415.

There is a duty to warn the driver only of a known or appreciated peril if a reasonably prudent person would have given such warning under the same or similar circumstances, and the risk would thereby have been averted. *Melone v. Jersey Central Power & Light Co.,* 18 N.J. 163, 113 A. 2d 13.

The peril cannot be said to be "known and appreciated" unless the passenger (1) is aware of the hazard and (2) circumstances indicate to the passenger that the driver is unaware of it. *Lehman v. Anderson,* 27 N.J. Super., 444, 99 A. 2d 517; aff'd on opinion below 14 N.J. 340, 102 A. 2d 385.

NEW MEXICO

Contributory negligence and assumption of risk can be defenses in an action brought under the guest statute. *Potter v. Wilson,* 64 N.M. 211, 326 P. 2d 1093; *Perini v. Perini,* 64 N.M. 79, 324 P. 2d 779.

Knowledge of the driver's intoxication and of recent reckless driving by him may constitute assumption of risk by the passenger, *Berkstresser v. Voight,* 63 N.M. 470, 321 P. 2d 1115; but there must be evidence of the passenger's knowledge at the time he entered the automobile. *Potter v. Wilson, supra.*

NOTE: The New Mexico guest statute was adopted from Connecticut. The legislature is presumed to have adopted the prior construction and interpretation by the Connecticut Supreme Court. *Smith v. Meadows,* 56 N.M. 242, 242 P. 2d 1006.

NORTH DAKOTA

The defenses of assumption of risk and contributory negligence are questions of fact. If proven, they bar recovery; however, these defenses are not available to a charge of wilful misconduct which is proven. *Ledford v. Klein,* N.D., 87 N.W. 2d 345.

A guest is not entitled to recover where he urges the driver to continue beyond his capacity to stay awake or be alert. *Ledford v. Klein, supra.*

The guest's protests against speed or improper driving are to be considered as a fact question in determining contributory negligence of the guest. *Anderson v. Anderson,* 69 N.D. 229, 285 N.W. 294.

OHIO

Contributory negligence of a guest is no defense if wanton or wilful misconduct on the part of the driver is established, *U. C. Pipe Company v. Bassett,* 130 O.S. 567, 200 N.E. 843, but contributory wilful or wanton misconduct is a defense. *Kirk v. Birkenbach,* 22 O.L.A. 569; 32 N.E. 2d 76.

While the law is not clear, assumption of risk has been recognized as a defense in lower court cases but the courts have not directed verdicts. *Gill v. Arthur,* 69 O. App. 386, 43 N.E. 2d 894; *Fay v. Thrasher,* 77 O. App. 179, 66 N.E. 2d 236; and the latter case suggests that, if the passenger assents to the wrongful acts of driver, his recovery will be barred.

OREGON

It is ordinarily a question of fact in Oregon whether a plaintiff's actions constitute contributory negligence. One who voluntarily rides with a driver whom he knows, or reasonably should know, is intoxicated is guilty of contributory negligence which bars recovery. *Peterson v. Abrams and Leatham,* 188 Ore. 518, 216 P. 2d 664; *Willoughby v. Driscoll,* 168 Ore. 187, 120 P. 2d 768; *Hartley v. Berg,* 145 Ore. 44, 25 P. 2d 932. The cases also indicate that ordinary negligence on the part of a guest is a defense when the conduct of the defendant was grossly negligent. *Lyman v. Heard,* 156 Ore. 94, 66 P. 2d 192; *Mitchell v. Bruening,* 139 Ore. 244, 9 P. 2d 811.

The Oregon court has not decided whether ordinary negligence is available as a defense under the statute when the defendant's conduct is "reckless." It should be clear that it would be no defense to intentional conduct. See, *Hawks v. Slusher,* 55 Ore. 1, 104 Pac. 883.

The holding in *Hunt v. Portland Baseball Club,* 207 Ore. 337, 296 P. 2d 495, that the defense of assumption of the risk is not confined to an employment relationship, indicates that this defense would be available to an action by a guest in a proper case.

SOUTH CAROLINA

Just as contributory negligence is a good defense in the ordinary negligence action, contributory recklessness is a good defense under the South Carolina guest statute. In *Jackson v. Jackson,* 234 S.C. 291, 108 S. E. 2d 86, the court said "a guest is barred from recovery for injuries caused by the host's reckless disregard of the guest's safety, if knowing of the host's recklessness, misconduct and the danger involved to said guest, the guest recklessly exposes himself thereto." The court went on to say that a guest continuing to ride with a person who is intoxicated, is reckless in the same degree as the driver, provided the guest has an opportunity to remove himself from such danger. In this area the South Carolina court is extremely liberal and whether or not a guest is guilty of contributory recklessness will ordinarily be submitted to the jury.

Hardigg v. Inglett, 250 F. 2d 895, contains the same statement as the case of *Jackson v. Jackson, supra,* on contributory recklessness. This was again a diversity

case involving the South Carolina guest statute.

SOUTH DAKOTA

A guest does not assume the risk of a driver's faulty judgment or hasty observations. *Hall v. Hall,* 63 S.D. 343, 258 N.W. 491. A guest assumes the risk of injury resulting from lack of skill, to the extent that lack of skill is known to the guest. Riding with one who has been drinking usually makes a question for the jury but seldom reaches the point where it constitutes assumption of risk as a matter of law. *Peters v. Hoisington,* 72 S.D. 543, 37 N.W. 2d 410.

A guest assumes the risk of glaring headlights on the host's car if the glaring headlights were apparent to him. *Petteys v. Leith,* 62 S.D. 149, 252 N.W. 19. But in *Knutsen v. Dilger,* 62 S.D. 474, 253 N.W. 459, it was a question for the jury whether a guest was familiar enough with certain special equipment such as oversized tires so as to assume the risk of death.

TEXAS

Ordinary contributory negligence of the guest is a bar to recovery. *Schiller v. Rice,* 151 Tex. 116, 246 S.W. 2d 607; *Sargent v. Williams,* 152 Tex. 413, 258 S.W. 2d 787. Recovery is barred by a failure to protest the driver's conduct and in continuing to ride with him when presented with an opportunity to alight from the car. *Schiller v. Rice,* 151 Tex. 116, 246 S.W. 2d 607; *Webb v. Karsten,* Tex. Civ. App., 308 S.W. 2d 114.

Assumption of risk or voluntary subjection to risk is a defense *Schiller v. Rice, supra.*

UTAH

In *Esernice v. Overland Moving Co.,* 115 Utah 519, 206 P. 2d 621, the guest accepted an offer of a ride from a truck driver who complained he was sleepy and tired and needed someone to talk to him to keep him awake. The court held that the plaintiff's contributory negligence in accepting a ride with a driver in such a condition barred any recovery from the defendant. In *Stack v. Kearnes,* 118 Utah 237, 221 P. 2d 594, the court held that the plaintiff could not be said to have assumed the risk since the first requests to drive slower were heeded. The plaintiff had no opportunity to get out of the car once it became obvious that the defendant was not going to drive in a safe manner.

VERMONT

Assumption of risk and contributory negligence are matters of proof.

A guest is not negligent in riding with an intoxicated driver if he is unaware of the intoxication or does not notice any facts which would arouse the suspicions of a person of ordinary prudence. *Abel v. Salebra,* 115 Vt. 336, 61 A. 2d 605.

If a person voluntarily rides in an automobile and knows or should have known of driver's intoxication, he can not recover from such driver, or third person, for injuries suffered in collision approximately caused by driver's intoxication, though driver's negligence is not imputed to the passenger. *Packard v. Quesnel,* 112 Vt. 175, 22 A. 2d 164.

VIRGINIA

It is important to mark the distinction between acts or omissions which constitute gross negligence and those which are termed wilful or wanton, because it is usually held that in the former contributory negligence on the part of plaintiff will defeat recovery, while in the latter it will not. *Thomas v. Snow,* 162 Va. 654, 174 S.E. 837.

Contributory negligence of a guest is generally a question for the jury: *Yorke v. Maynard,* 173 Va. 183, 3 S.E. 2d 366; *Waller v. Waller,* 187 Va. 25, 46 S.E. 2d 42.

The doctrine of assumption of risk has been briefly mentioned in one or two Virginia cases. Perhaps it is sometimes confused with contributory negligence. For a brief discussion of the sense in which it has been referred to, see *Boggs v. Plybon,* 157 Va. 30, 160 S.E. 77.

WASHINGTON

Lambert v. Smith, 154 Wash. Dec. 425, 340 P. 2d 774, indicates that, when a plaintiff seeks recovery on the basis of intoxication, contributory negligence and assumption of the risk are available as defenses. Whether the Washington court will adopt a rule that ordinary negligence on the part of the plaintiff will bar his recovery from a grossly negligent defendant, is open to question. See 32 Wash. L. Rev. 210.

What effect that portion of the amendment dealing with corroborative evidence will have in these cases is not clear. It will perhaps be rare when the requirement is not satisfied, and it seems almost certain that corroborative evidence will not be a requirement in those cases in which the plaintiff seeks to prove the absence of guest status. 32 Wash. L. Rev. 210.

WYOMING

There does not seem to be any Wyoming case arising under the guest statute as to whether the contributory negligence of a plaintiff will bar his recovery.

Respectfully submitted,

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The Unsworn Witness

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THIS article discusses the problem of the unsworn witness – the lawyer who by reason of a contingent fee agreement has become a silent co-plaintiff in a personal injury case and undertakes to urge the jury to adopt his personal appraisal of elements of unliquidated damages which are not susceptible to monetary proof. The possessor of a contingent fee is the owner of a substantial interest in the subject matter of the litigation and propriety demands that such a person be prohibited from the role of an unsworn witness in his own behalf.

This is not a criticism of the contingent fee. The contingent fee is deeply imbedded within the framework of customary legal practice in America and sometimes serves a useful and humanitarian purpose for those possessed of valid claims and who do not choose to entrust them to other types of legal assistance.

Nor is this a criticism of any class of lawyers. It is simply a reanalysis of a practice which has been passively accepted as a matter of course by lawyers in many jurisdictions whether they were for the plaintiff or defendant.

However, recent and persuasive opinions by several highly respected courts impel closer scrutiny of the practices those courts have condemned. The discussion also appears timely because a number of public officeholders are now using certain unfortunate trends and results in personal injury cases as an excuse to remove another great area of traditional judicial responsibility from the courts with the purpose of placing it in the hands of additional political administrators, bureaus and commissions.

This problem of the unsworn witness was foreseen many years ago by a few courts. "The law, therefore, permits no estimate to be given by either party to the jury, even under oath, of the money amount of such damages, and to get the same character of estimates before a jury by indirect methods is a reprehensible practice." So spoke the Third Circuit[1] in 1914 when reversing an award for a plaintiff whose attorney while cross examining the defendant had mentioned the amount prayed in the complaint.

Recent years have seen an extension of this "reprehensible practice" in some courts to a point where the voir dire, opening statement and summations for the plaintiff are saturated with the unsworn estimates by counsel of the monetary value of pain and suffering, humiliation, embarrassment and inability to enjoy life – even to the extent of putting counsel's own price tag on such intangibles for each minute, hour, day, week, month and year of life expectancy and urging the jury to adopt the sum total of counsel's estimates. The practical result is that plaintiff's counsel can select any fantastic sum for the ad damnum and with specious plausibility argue that the figure is supported by the evidence. Actually, the only limitation on the amount is the bounds of a willing imagination.

The process begins with insertion in the petition, declaration or complaint of a monetary demand in a figure far in excess of the amount which any court would permit to stand in the event of a full recovery. From then on, the size of the monetary demand is the main feature of the case.

The newspapers seize upon the size of

[1] *Vaughn v. McGee*, 218 Fed. 630.

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the money prayer as news and the public reads such daily headlines as:

$250,000 SUIT
FILED AGAINST
LOCAL CONCERN

With the commencement of trial another article may be featured with the headline:

TRIAL OF QUARTER MILLION
DOLLAR SUIT COMMENCES

The next step is a suggestive and repetitious questioning of each juror on voir dire concerning his willingness to award a quarter of a million dollars, such interrogation always being cushioned by some protective phrase such as "provided, of course, the evidence justifies such an award."

Plaintiff's counsel, now satisfied that each of the twelve jurors has committed himself to an attitude of liberality with the defendant's resources, proceeds to make the opening statement for plaintiff. Again the monetary demand of the prayer is asserted and casual reference is made to the committments which cousel has extracted on voir dire.

After the taking of the evidence, the opening summation for plaintiff is made. At this point an attempt is made to correlate the demanded figure with the evidence as plaintiff's counsel proceeds to give an arithmetical breakdown of the $250,000 figure to demonstrate the simple mathematical formula which he asserts was employed in his office in the process of selecting the magic figure. Pain and suffering, wounded feelings, humiliation, embarrassment and inability to enjoy life as before are each accorded a specific dollar value by the minute, hour, day, week, month and year for the life expectancy of the plaintiff. The sum total of these itms invariably exceeds the prayer, thus indicating that the demand is actually too conservative. By this simple procedure a seemingly plausible explanation is given for the inflated demand that has been made.

Frequently, in the opening, a challenge is made to defense counsel to express his own monetary valuation of these items on a similar basis in the event he disagrees with the asserted figures. Defense counsel will usually decline to do so because at that point the trial would degenerate to a mere rivalry of opinions by counsel, and a mutual personal attack upon the attorneys' motives, sympathies, prejudices and the mental processes by which their opinions were arrived at. Also, to accept the challenge would be to impliedly endorse the propriety of the method used.

In closing, plaintiff's counsel repeats his monetary suggestions and frequently experiments with different sets of rates which he invites the jury to employ.

The situation is not helped when the court repeats the demanded figure in the instructions although it cautions the jury that reference to the sum claimed is not made for the purpose of suggesting that the claimed amount, or any other amount should be awarded, but only to advise them not to return a verdict in excess of the amount asked. The implication of such an instruction is that the jury is free to return a verdict anywhere within the original amount prayed.

The foregoing performance is not permitted in every jurisdiction but it outlines the prevailing practice in many courts.[2]

From where do these figures come? No witness, however expert, could testify to their accuracy. No plaintiff could provide such testimony. Yet, the practice of permitting counsel to express unsworn opinions on the subject has either been permitted or gone unchallenged in many jurisdictions. The end result of the practice may well be a distorted verdict bottomed upon self-serving and wholly inadmissible unsworn opinion testimony. Pennsylvania has never tolerated the practice.[3]

Recognition of the abuses invited by such procedures led the Supreme Court of New Jersey in 1958 to take a forthright position on the matter.[4] In a penetrating and lucid analysis of the problem, that eminent court:

(1) Expressly overruled previous decisions permitting counsel to advise the jury of the amount in the ad damnum;

[2]See Survey by Practice and Procedure Committee of International Association of Insurance Counsel, Charles P. Gould, Chairman. October, 1959 issue of Insurance Counsel Journal.

[3]*Joyce v. Smith*, (1921) 269 Pa. 439, 112 Atl. 549, "A cause is not well tried unless fairly tried, and a verdict obtained by incorrect statements or unfair argument or by an appeal to passion, or prejudice, stands on but little higher ground than one obtained by false testimony. *Saxton v. Pittsburg Rys. Co.*, 219 Pa. 492, 68 Atl. 1022. The amount of damages claimed is not to be determined by an estimate of counsel, but by the jury from the evidence before them, and any suggestion to the jury of an arbitrary amount is highly improper."

[4]*Botta v. Brunner*, 1958, 26 N.J. Law 82, 138 A. 2d 713, 60 A.L.R. 2d 1331.

(2) Expressly overruled a previous decision permitting plaintiff's counsel to express to the jury his opinion of the amount that should be awarded;
(3) Expressly overruled a previous decesion approving reference to suggested amounts as reasonable compensation; and
(4) Held that the trial court did not err in refusing to allow plaintiff's counsel to suggest to the jury in summation a mathematical formula for admeasurement of damages for pain and suffering.

Promptly after the *Botta* decision was announced, it was followed on the fourth point above by the Supreme Court of Delaware,[5] more recently by the Supreme Court of Appeals of Virginia[6] and even more recently by the Supreme Court of Missouri.[7] With this favorable reception of the eminently proper rules laid down in *Botta v. Brunner,* more courts can reasonably be expected to recognize the justice and necessity of the long standing Pennsylvania rule which was adopted in the *Botta* case.

The well conducted English courts do not allow counsel to run rampant with monetary suggestions to the jury which could not be admitted into evidence even if offered under oath. The English practice is to require the pleader to itemize his special damages and a typical statement of claim then concludes with some such prayer as the following: "and the plaintiff claims against the defendants and each of them damages." No opportuniy is accorded British counsel to place an arbitrary and inflated market tag upon the claim and then to argue fallaciously that the amount of the claim should have something to do with the size of the judgment to be awarded.

The requirement in most states that the amount of money demands be stated in the complaint (to fix the jurisdiction of the court in which the case is filed or removability) does not mean that the amount claimed should be a subject for consideration by the jury or that the amount claimed should determine the amount of publicity to be accorded the case. Certainly the limits of propriety are violated when counsel presents such amount as his personal appraisal and recommendation to the jury.

Counsel should have no privilege by indirection to inject opinions on values into the record in an area where the law prohibits estimates by even the most qualified witnesses after having taken a solemn oath.

The law imposes no restraint upon counsel in fixing the amount of the ad damnum. Nor does the law ascribe any particular values to such intangibles as pain and suffering. Therefore, under the practice allowed in New Jersey before *Botta v. Brunner,* counsel was free to select any figure and express repeated suggestions and opinions regarding it. The constant repetition of figures which are neither provable nor disprovable by competent evidence is bound to have an influence upon the jury, and the whole thing emanates from nothing other than the mind of counsel. The jurors are innocent victims of constant repetition and suggestion in a field which has always been left to the discretion of the jury unaided by extrinsic proof of values. After a week of this brain washing technique, the jury is likely to fall back upon the unchallenged opinions of counsel for the simple reason that no other specific figures have been mentioned. "Such is the pavlovian device: Repeat mechanically your assumptions and suggestions, diminish the opportunity of communicating dissent and opposition. This is the simple formula for political conditioning of the masses."[8]

In the *Botta* case this diminution of opportunity to dissent was aptly demonstrated in the opinion as follows:

> "If plaintiff's counsel is permitted to make such valuation suggestions to the jury, justice cannot be administered fairly in the trial of this type of case. Can defense counsel argue that pain and suffering are worth only $2.50 per day or $1 or any lesser sum? If he attempts to do so, he must necessarily inject as further factual

[5] *Henne v. Balick,* 1958, 146 A. 2d 394.

[6] *Certified T.V. and Appliance Company v. Harrington,* 1959, 201 Va. 109, 109 S.E. 2d 126.

[7] *Fraught v. Washam,* 1959, Missouri, 329 S.W. 2d 588, "As the Supreme Court of New Jersey warned in passing, if the day ever arrives when that type of speculation becomes accepted by the courts generally as a fair mathematical factor for use by juries, proponents of the view that motor vehicle accident injury claims should be treated on some basis similar to workmen's compensation will have grist for their mill."

[8] Joost A.M. Meerloo, M.D.—"The Rape of the Mind," page 47. (1956, World Publishing Co., Cleveland and New York).

suggestions valuations which again are incapable of proof. By doing so, he fortifies his adversary's implication that the law recognizes pain and suffering as having been evaluated and as capable of being evaluated on such basis. Much emotional reasoning can be advanced for the thesis proposed in behalf of injured plaintiffs. But in our search for equal opportunity in the trial of cases for the contending parties to offer their proof and submit their arguments thereon, the practice cannot be justified. And when the inequity of such trial procedure is considered along with the obvious impropriety of attempting to substitute unproven, speculative and fanciful standards of valuation for evidence, the duty to adjudge the illegality of the proposal in its entirety is plain."

In the present day a court can assume with reasonable safety that the plaintiff's lawyer in a presonal injury case is retained on a contingent fee basis. Such a proprietary interest in the fruits of litigation constitutes a temptation to employ questionable tactics. Where the reward in a contest is contingent upon success, the temptation to breach propriety is ever present. In such an area, the courts should zealously restrain overreaching advocacy.

When an unsworn witness urges his own financial interests to a jury under the guise of sympathetic aid to the unfortunate, the law should impose rigid restraints upon the expression by him of suggestions and opinions on the subject of monetary award to be made.

The law requires a lawyer to withdraw from a case in which he takes the witness stand – yet, we have the amazing paradox which permits a lawyer with a direct financial interest in the result to urge upon the jury his unsworn suggestions and opinions concerning the value of intangibles which are not susceptible to monetary proof.

The dilemma can be solved by either of two methods: (1) Abolish the contingent fee, or (2) Adopt the New Jersey rule which would prohibit the lawyer with a proprietary interest in the litigation from becoming an unsworn witness in his own behalf.

How could any court affirm a judgment on a record which showed that an interested person owning an undivided interest in the subject matter had been permitted to stand before the jurors and urge them to adopt his personal valuations of the intangibles involved? Such a person has discarded the role of advocate and become an interested witness in his own case – one fraction of the case belonging to the client and the remaining fraction to the unsworn witness.

Suppose a lawyer became a plaintiff as a result of an accident in which he was injured. Suppose he erringly undertook to plead his own case. Should he be permitted to tell the jury in argument the amount which he thought he was entitled to be awarded for those intangible elements of damage which rest only within the fair discretion of the jurors? Is the situation altered because he urges the same amount to be awarded knowing the same is to be proportioned between himself and the plaintiff under an undisclosed contract?

This article touches upon only one facet of the general problem. It does not touch upon the economic impact of enormous verdicts upon the public in general, Nor does it touch upon the social implications of courtroom procedures being reduced to an ostentatious display of colored body atlases, lurid drawings by medical artists, colored photographs of injured parts, to say nothing of the importation of bones and skeletons, casts and surgical appliances. Any one of these devices might conceivably be appropriate in a particular case, but wholesale importation of such devices into the courtroom to dramatize and buttress the arguments of the unsworn witness cannot help but reduce the respect of the public for the judicial process. Lawyers are not hucksters nor is the courtroom a market place where pain and anguish are put on display at a demanded price.[9]

[9]"It perhaps may not be out of order for me to state the practice that I follow in my own court and that many other judges follow. This is done because this practice seems to be in the interest of substantial justice. The ad damnum is not disclosed and is not permitted to be disclosed in my court. The purpose of the ad damnum is only to establish jurisdiction. It has no bearing on what should be awarded the plaintiff by the verdict. After all, you know, any lawyer or any stenographer could multiply the ad damnum by ten by hitting a cipher on the typewriter one additional time. It doesn't mean anything. So, too, in his summing up neither counsel is permitted to suggest an amount of the verdict. It is just as unreasonable to permit plaintiff's counsel to suggest an amount as it would be to permit a defendant's counsel to say, 'Well, we don't think the jury should award this man more than $250.' We wouldn't permit that, and what is the rule for one side should be the rule for the other.

"Of course, special damages that are subject to

It is respectfully submitted that the sound administration of justice requires a unanimous endorsement of the principles of *Botta v. Brunner* which go a long way toward maintaining the integrity of the judicial process and restricting the role of a lawyer with a contingent fee to that of true advocacy.

computation may be stated. I am referring to the general damages for pain and suffering and the like.

"So, too, the use of a mathematical formula for determining pain and suffering is not permitted. The idea that pain can be measured at a specific sum per hour or per day is not only absurd but is also unjust, and it is apt to lead to ridiculously extravagant and excessive verdicts if the argument has any effect on the jury, and for a very similar reason, the blackboard is not permitted to be used except for the purpose of putting down the special damages, if desired, but not for the general damages." —remarks of the Honorable Alexander Holtzoff, Judge of the United States District Court for the District of Columbia at the 1959 meeting of the Section of Insurance, Negligence and Compensation Law, Miami Beach, Florida, August 24-27, 1959, appearing at page 179 of the published proceedings of the Section.

The Profession of Trial Advocacy*

EMILE ZOLA BERMAN
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THE homage of history is rightfully paid to Peter Zenger, the first great champion of freedom of the press in North America. But with an indifference almost callous, history has paid little—if any—tribute to Andrew Hamilton, the brilliant trial lawyer, whose devoted defense of Zenger stood between him and the despotism of the british crown in pre-revolutionary days.

This indifference is symbolic in a way of the inattention and lack of diligence with which many of our law schools and large segments of the bench and bar today all but dismiss trial practice as an insignificant, if not downright undignified, adjunct of the lawyer's art. These elements of our law society cater to the voracious legal requirements of corporate and inherited wealth in this country which absorbs a large part of our modern law school product and leaves the remaining graduates to thrash about in fields such as advocacy, untutored, untested, untried—more of a hindrance than a help to their clients, unless they are fortunate enough to fall under the guidance of an experienced advocate with the patience and understanding to teach them—and to tolerate their early mistakes.

Yet advocacy is the ultimate weapon of justice, the essence of human freedom. The courtroom is the arena essential to the preservation of the dignity of man—without it he would descend to the barbarous battleground where might makes right—where the mace prevails over honor and where the mailed fist crushes truth. It is in the courtroom—and only in the courtroom—where the noble work of the Barons at Runnymede and the inspiring legacy of our Founding Fathers at Philadelphia are made the vital guardians of the sublime rights with which man came into the world—and with which he must leave it. Far more than the conference room where the antitrust specialists work out the complicated details of a corporate merger—far more than the luncheon table where a tax expert explains the intricate refinements of a personal holding company—the courtroom is civilization's monument to order, to dignity and to justice.

What a pity it is that advocacy—the art of the courtroom—is the most ignored specialty in modern law schools. Is it any wonder that it is, therefore, the least chosen specialty of law graduates?

This is not a problem of exclusive concern to our law schools. Judges and practitioners are equally charged with responsibility for its correction. All of us must have had an experience at one time or another where we observed the stark impracticality of substituting a busy law office for the calm, far-ranging, deliberate law school course as an educational forum. Judges must observe almost every week how their own work is increased and their own function misdirected by the inept practitioner without training or experience. We cannot ignore our responsibilities or avoid them with the classic callousness of Louis XV—"Apres moi, c'est deluge." The burden is on us to make advocacy the absolutely essential specialty to be taught, and the attractive, rewarding practice, which it is.

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*The substance of this paper was delivered to the convention of the International Academy of Trial Lawyers at Coronado Beach in January, 1959; to a joint conference of the Section of Legal Education of the American Bar Association and the National Conference of Bar Examiners at the American Bar Association convention at Miami Beach in August, 1959; and to the Vermont State Bar Association in September, 1959.

This is not a super-human burden by any means. There is much to commend advocacy as a career and one need be only analytical, not apologetic, in encouraging such a career. Because of my own experience, I shall confine my remarks in this matter of encouragement to trial practice, although without any effort they could be extended to cover the entire field of advocacy.

First of all, almost every trial is aimed at determining man's rights—whether against the state or against his fellow man. There is one word to describe this target—justice. It seems to me that no young lawyer can find a richer reward in his entire career than in taking advantage of the opportunity to contribute to justice and to the ennobling tradition of justice which is the hallowed hallmark of our civilization. The feeling that comes with a job well done is one thing—the soaring spirit that elevates us with a hard won triumph of right is quite another. I think Terence Rattigan in his play, "The Winslow Boy", has captured this spirit well. The lawyer who has pushed and shoved, dragged and tugged a young lad through a morass of bureaucratic indifference, over a barricade of parliamentary pressure, and beyond the numbing influences of administrative presumptions and governmental favors at a trial to emerge at the end with the boy's honesty upheld and his honor vindicated —is a man who, in one great moment of his life, has explored the very pinnacle of the human spirit and has known the transcendent joy of real human achievement. Such an experience—even if only once enjoyed—is no mean accomplishment in life.

Secondly, the material which a trial lawyer uses and develops is the stuff of life itself, ideals and ambitions, disorders and disagreements, passions and integrity, honesty and chicanery—the entire ambit of human nature at its sublime best and degraded worst. No science, no art, no trade provides its craftsmen with such stimulating tools. The trial lawyer sees life, beyond his own experience, every day. He is an actor in real life dramas of infinite variety. He is constantly in touch with the outraged innocent, the devious fraud, the upright citizen, the pathological liar, the passionate perjurer. He is always confronted with the task of sifting through the thin or crusted veneer of superficial humanity to find the real truth. His task is thus made a lively, diverting adventure. Such adventures never fail to improve his skill —and from his own point of view, cannot but help him to make his own life more fruitful, more enjoyable and more helpful.

Thirdly, the challenge of trial practice to the young law school graduate is enormous. Trial practice is a highly specialized and highly developed art. Familiarity with rules of evidence, experience in dealing with people, knowledge of developments in the behavioral sciences, facility in fact finding, command of the language—these are some of the basic skills which a successful trial practice demands. In addition, no practitioner will go far in the trial court without an analytical intelligence which can apprehend every detail in relation to the whole and can, even while pursuing the most obscure tangents, keep the whole case within the range of his mind. Not the least of his aptitudes is the practitioner's courage and fighting heart—courage to make a decision and instantly to act on it and a fighting heart to believe in a cause and tenaciously to cling to that belief. Finally, the trial lawyer whose sincere belief in his case and genuine willingness to put that belief at stake at all times are evident—is one who cannot fail to make a good impression of himself and of his client on the triers of the facts.

The acquisition of these skills and the development of these characteristics is the great challenge which the young lawyer faces in this field. He can avoid the challenge, of course, and thereby hold himself out to be what he is not. On the other hand, he can pick up the gauntlet with relish, determination, and ambition; he can work, study, practice and apply himself; he can, in a word, succeed and thereby do credit to his profession and his specialty.

Fourthly, the tangible rewards of a career in trial practice are not small. There can be no doubt of the fact that a deserved reputation as a trial specialist brings with it adequate pecuniary returns not always available to members of our profession.

I suppose that trial practice appeals most to those young men and women who entered law school with the glamorous picture of some great courtroom artist in their minds. Such a practice confronts their discreet passion for the spotlight with the most available opportunity for illumination. This perfectly human attitude must be focused into the proper professional channel so that it does not produce a

lawyer concerned more with his impression on the public than with the interests of his client. In any event, such students present no problem on the subject of encouragement, at the law school level, of trial practice as a career. The real problem is created by those students who regard trial practice as undignified, unremunerative or, even worse, unworthy of their talents. These are the young men and women who are easily lured by the siren songs of a tax practice or corporate specialization.

Much emphasis is being laid on procedural approaches, the techniques of interlocutory proceedings with great expansions, particularly in discovery and pretrials—but sad to say—our law schools today are not doing very much by way of a vigorous, imaginative, informative program designed to demonstrate to students the great opportunities and challenges of a career in the courtroom. It is up to the bar, therefore, to provide the schools with the ideas and talent for such programs. Seminars and courses in evidence are not enough; moot courts only scratch the surface. Year long courses utilizing the methodology of lectures, clinical approaches, demonstrations and exercises are required to teach principles, tactics, techniques and strategy.

The late Chief Judge Vanderbilt of New Jersey, and Associate Justice Jackson of the Supreme Court, are two of the many lawyers and jurists who have bemoaned the present state of advocacy. Judge Vanderbilt wrote:

> "Advocacy is not a gift of the gods. In its trial as well as in its appellate aspects it involves several distinct arts, each of which must be studied and mastered. Yet no law school in the country as far as I know pays the slightest attention to them. It is blithely assumed, with disastrous results, that every student is born a Webster or Choate."

It is no reflection on a lawyer that he has not specialized in the art of trying cases before juries, that he is not a trial lawer, but it is a discredit upon him and to the bar if he attempts to try cases being grounded in the science and principles of law, but having ignored and being ignorant of the art and principles of trials. Mr. Justice Jackson said:

> "It seems to me that while the scholarship of the Bar has been improving, the art of advocacy has been declining."

The art of advocacy need not remain in the state described. We have available to us the tools with which to revitalize it. We have eager young men and woman every year gracing the bar with new and fresh distinction. It is up to us to see that while still in their formative stages these young people are thoroughly acquainted with the purposes, rewards, challenges and opportunities of an advocate's career. In the final analysis the hardpressed litigent, or the innocent accused who is deprived of his rights through poor advice or inadequate representation must be a specter haunting the whole law society. Able advocates and adequate training in advocacy will dissipate such a specter.

It was Webster who said: "Justice is the most important interest of men on earth." In a country governed under law and glorified by a heritage of human freedom derived from the nature of man himself, there can be no higher dedication than that of achieving justice. In all the fields of human endeavor there is no achievement quite as sublime as a human right preserved. History may not record it—his bank balance may not show it—his contemporaries may not recognize it—but the lawyer who prevails against injustice and crushes despotism adds a lustre to his time and civilization which no power on earth can shroud. Justice is man's great work and the courtroom its most productive laboratory. In my judgment there can be no better testimony to a lawyer than that—in a mad, volatile, materialistic world about him, with the demands of his family and his profession constantly pressing in on him—he has devoted himself with passionate zeal to the ideal expressed in those deeply significant words of the old English Petition of Right: "Let Right be Done."

Who Owns The Law Suit?

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MANY times skeletons in family closets come to life and burst with great violence upon the quiet and happy habitat of their owners. In the ever changing world of personal injury damage claims in this country, there is no skeleton which has been more gingerly handled, fervently quieted, or more determinedly overlooked than the problem of the proprietorship, from the plaintiff's standpoint, of the law suit filed for personal injury.

There is universal agreement that no professional person handling another's problems, whether legal or medical, should have the least proprietary interest in his client's misfortune, or cause of action for alleged injury perpetrated against him.

The physician certainly has no proprietary interest in his patient's disease. Were he to bet with his patient to the extent of charging nothing if his patient died, or $10,000.00 if he were cured, he would have a proprietary interest in the disease. If some medical practitioner suggested such a procedure, not only the medical world itself, but all right thinking potential patients would rise up in horror. They would know that many factors would be introduced into the calm professional judgment necessary to a doctor's best treatment of his patient, which might cause the doctor to be subconsciously gambling with the life of the patient so that he would either be killed or cured.

There are times when the doctor knows that a conservative prognosis will be that the patient must live with his ailment, and it is the duty of the doctor to make him as comfortable as possible under the circumstances. Should the doctor be influenced in any way and attempt to hit the jack-pot on such a case by some radical course of treatment which might not be attempted under different monetary conditions? Of course not.

Still, in many of our large cities today, a great percentage of damage business is obtained by plaintiff lawyers who promise to finance the client during the pendency of the lawsuit. I shall give examples later as to the extent to which this goes but, at the present time, let us consider the proprietorship of a law suit where a lawyer has $7500.00 of his own money in the case, and another 35 percent of the recovery is his fee.

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Where does his interest leave off and his client's interest begin? Does he think about his $7500.00 first, or his client's claim first? He worked hard for that $7500.00 and it probably cost him $15,000.00 or more of his earnings to obtain it in the first place.. Many times during the pendency of that claim decisions are going to have to be made which will not affect his client and himself in the same manner. Where do his loyalties go —to his $7500.00—or to his client's opinion that the case should be tried even though his $7,500 prudence dictates he should take a settlement substantial enough to cover his own investment, a little for the client and a fee for himself?

Now let me present one complexity of the contingent fee—is it in the best interest of the client if he receives an adequate offer, to immediately consummate the settlement, so that he can pay off his debts to his doctor and hospital, and invest his residue in earnings?

But an adverse interest may be introduced. After a lawyer has made large sums

on contingent fees already during the current year, and another fee will put him into a tax bracket entirely too high in his opinion, should he delay this satisfactory offer of settlement? Let's face it—on hundreds of occasions, near the end of the year, defense lawyers and adjusters have been told by plaintiff lawyers that they are not going to settle a particular case, even though the offer is adequate, because it will make the plaintiff lawyer's tax bracket too high for the current year. Is this the client's claim, or is this the lawyer's claim?

Many examples could be given of unfortunate case histories. Each produced skeletons. Let's take just one. In the recent case of a young child with his leg severed, his case was tried and lost. A post investigation revealed that the proposed offer of settlement was never conveyed to the child's father—but the plaintiff lawyer instead tried this claim as his own, and elected to gamble without consulting his client.

These are some of the skeletons in the family closet of the American bar, and these skeletons do burst forth and flap their bony arms in the media of American public opinion—much to the detriment of all American lawyers, the greater number of whom by far are innocent bystanders to these goings-on but who suffer with the two or three percent of the bar to whom ethics is but a word without meaning.

It occurs more and more every day, as more and more the lawyer makes as much money out of his tragedy as the client—as the specialist's income becomes substantial—and his financial and tax problems are more and more a part of the consideration for his tactics in handling the claim, rather than the good of his client.

The age-old concept of the attorney-client relationship has been one in which the attorney renders his service and charges his client in direct proportion to the time consumed and the services rendered. To the American nature, in all probability, the modification of this principal by the introduction of a gambling element, to wit, the contingent fee, in remuneration of the attorney's services, is probably as natural as was the consumption of sassafras and molasses in the spring of a decade ago.

The courts which overruled the Acts of Champerty by such opinions as that expressed where the taking of a fee was champertous under the law if it was for a per cent of the recovery, but the taking of a fee was not champertous under the law if it was for an amount equal to a per cent of recovery—stretched the legal fibre of rationalization of those courts which made them. However, these fees, becoming legal as they did under such resourceful circumstances, were, perhaps, under the conditions which prevailed at the time the contingent fees were born, a generally fair and many times helpful opportunity for a client to obtain the services of a lawyer. The economic and low recovery situation prevailing at the time of the introduction of legal contingent fees, in many cases, presented a real element of danger that the plaintiff would recover nothing, or if he recovered such judgment as was sought, would find himself with a defendant unable to pay on execution.

Thus, lawyers worked for some years in a fairly stable market of relationship of services rendered to monetary results obtained in the field to damage cases. This era has been ended in the United States by two principal factors.

The first was recently well stated in the majority opinion of Van Voorhis, J., in the New York Court of Appeals:[1] "While liability in the negligence field has been constantly expanding and the size and proportion of recoveries has mounted in constantly increasing progression, the risk of the lawyer under contingent fee agreements has been reduced, and his remuneration magnified."

I imagine that those insurers who engage in business in many metropolitan areas of this country find their claims so cancerous that they are offering money settlements on practically all the personal injury cases reported to them. Cancer usually causes death but, while this patient is dying, contingent fees in those areas are replaced by guaranteed contingent fees. Under this situation the plaintiff lawyer always has a basic fee offered in the settlement, and the only time he would lose it would be when he elected to gamble in those trials going to judgment, which the Appellate Division in a test check found constituted 1½ per cent of 150,000 suits filed.

The second factor, which has entirely changed the climate concerning the ability of the injured to pay his attorney, at the regular bar rate, stems from the almost absolute assurance that there will be a re-

[1] *Gair v. Peck*, 6 N.Y. 2d 97, 160 N.E. 2d 43, petition for certiorari denied by the Supreme Court of the United States.

serve of money available to the defendant from which collections of claims will be paid. This is available either from insurers, or from the financial capability of those able to self-insure. The lawyer can look a potential retainer over. If the factors which he needs for collection of an attorney fee are not present, he need not and probably will not take the case, as he cannot collect for a client in such a situation either.

The question as to whether or not the contingent fee is a moral or ethical approach by a professional man in rendering service to his client is one that I shall not discuss in this article. This subject alone has been argued voluminously since the early 1900's when it came into general legal acceptance in this country. One fact, however, among many, must still be recognized. With the exception of Spain, Lebanon, and a few Latin-American countries, the use of the contingent fee is illegal in every country of the world, outside the United States.

The use to which contingent fees has been put, I shall feel free to discuss. While there might be some sort of system where contingent fees would be equitable in most cases, such system has not been seriously discussed by the bar of this country, let alone put into effect. One problem of contingent fees in today's market is simply that the fee many times outruns the service connected with the fee, and that the exaggeration of contingent fees has placed a burden on the insuring public of this country under which it is beginning to fret, as well as on the injured claimant.

It has also placed a black pall of doubt by the public against those lawyers who obtain big fees for small services—contingent only, on whether or not the defendant had a large insurance policy or whether the insurance company recognized the claim as one of liability and it and the plaintiff's lawyer elected to settle without controversy. The fact that in so many cases, the amount of time consumed and the services rendered the client have absolutely no connection with the resultant fee, has to be discussed some time or other by the American bar. It definitely is being discussed by the insurers of this country, and it is definitely being discussed by many of the thoughtful citizens of the United States.

For the purpose of this article we will take for granted that the contingent fee is here to stay in some form. We must then continue our exploration as to whether the contingent fee is being misused by some plaintiff lawyers. Need we more proof of this than the statement of the claims specialists' national spokesman—Melvin Belli? This San Francisco NACCA leader recommended several months ago that contingent fees in personal injury cases be regulated. Mr. Belli stated, "I think one-half of the San Francisco lawyers handling personal injury cases charge their clients too much. If they don't regulate themselves, and reduce their fees, the state will step in with a Commission. By cutting present high fees, there will be no need for a State Commission."

What did Mr. Belli mean when he said that some attorneys charge too much? Only by specific examples can this term be defined. Let me repeat again the case of an attorney in Minneapolis who was principally engaged in the damage business on the plaintiff's side until he died. His administrator wrote a report two years later as to the progress on the settlement of the estate. During those two years the administrator had loaned to clients, together with loans pending at the time of the lawyer's death, a total of $175,000.00. During those two years, the sums paid for injury releases exceeded $2,000,000.00. The injured actually received, after lawyers fees, expenses and loan payments were taken out, only $645,000.00. This was a little more than 32 per cent of the money awarded them for their pain and loss.

The persons who live off this kind of traffic—the doctors, the investigators, the local counsel, and the estate—were paid $1,430,000.00. The administrator and the estate profited handsomely and neither of them had to be lawyers. Is this the modern practice of law which all lawyers want?

To keep this skeleton in our closet, as has been done for so many years by the American bar, is no longer possible. We might as well take it out, look at it, see if it is defensible. If it is not, we should try to rectify the practice of the law to the extent that it shall be continued as an honorable, ethical and fair profession. And thus, we enter into another phase of this problem, which is an analysis of the resultant economical and ethical situations which arise under contingent fees. Let's discuss them in the light of individual situations.

When a man, human in his strength and frailties, cuts a slice of 30 per cent to 50

per cent of an unknown sum of money which someone wishes to obtain in the future, will his advice, tactics, opinions and actions be those of a man who is employed as an independent contractor on an hourly basis to obtain that sum of money under the most economical circumstances which he and his client feel is fairly due in a damage case? It is clear that many personal elements might involve a man's attitude and actions if $30,000.00 of a $100,000.00 expectant recovery were to be his. What might some of these elements be? We have mentioned his current tax bracket. We all know it affects settlements. It happens more every day because the lawyers with the fluctuating income are the ones that are handling the bigger damage cases. Their tax brackets are affected by big settlements to a larger extent than the average practitioner who goes along year after year with about the same income.

This may be an evil. But there is an entirely greater evil which could result from the fact that having not too much to lose in his tax bracket, a big income lawyer can always reason, "I would like to gain recognition by gambling and getting either a lot of money or nothing in this case so as to improve my name in the business." On that basis, does he try the case because it should be tried, or because of an ulterior motive which he has as proprietor of that law suit?

Do not, for one moment, disabuse your minds of the fact that this does not happen. It certainly does; I have had it said to me by lawyers who wanted to gain publicity thru the trying of a certain law suit.

As can be easily seen, the lawyers referred to here are not those general practitioners who are the great bulk of the 250,000 lawyers constituting the American bar. Nor do I imply that many of the lawyers who specialize in damage claims do not sincerely pursue their clients' interests. I merely state a fact, that the experience we are having indicates that, subconsciously in many cases, and consciously and intentionally in many other cases, the present relations in many damage claims are such that the lawyer and his client will have adverse interests before the claim is settled.

Any general practitioner in Chicago and other similar cities will tell you that he has less and less opportunity to engage in the damage practice. I would imagine about 90 per cent of Chicago plaintiff cases are obtained by an infinitesimal per cent of those cities' lawyers who specialize in plaintiff damages and that the other 10 per cent are handled by the general practioner. This record is borne out through the investigation by the Cleveland Press a year or so ago which revealed that out of 3,500 lawyers in Cleveland, six firms had 65 per cent of those damage suits at issue in the Cleveland courts—the number of these suits being 1,800—and one firm out of these six controlled over 400 of these cases. This was one day's run and these firms are settling part of this 1800 and adding new suits daily to this ready list. Just how many claims do they handle a year?

This is not a natural distribution of business, and has to occur for certain reasons. One is the element of ambulance chasing by which any lawyer can obtain more cases than he would otherwise. Another, by offering inducements to clients by way of financing. Still another is by lawyers not wanting to handle these matters, turning their cases over to a few specialists. Now lawyers are not throwing their income away, so we come to the inescapable fact that, on the plaintiff side today, the result is usually a fee inflated enough in amount so that not only one law firm is made happy, but that two law firms can divide it, and still have both remain happy. What does this mean then, that the basis of the average contingent fee it twice as much as it should be?

I have stated before that an experience pursued for a year by one of the large automobile insurance companies indicated that at a 35 per cent contingent fee, 24 per cent of all the money which is spent for personal injury releases went to plaintiff lawyers. On the computation of the amount spent for obtaining personal injury releases last year, which was approximately $2,415,000,000.00 (approximately $9,300,000.00 spent every working day on personal injury settlements alone), the sum of almost $580,000,000.00 was taken by plaintiff lawyers in contingent fees.

This total may mean nothing except for the economic cost to policy holders, unless there was some exaggeration in it for the services rendered. This thing of excessive attorneys fees has to be met. Let's face the fact that in many cases the plaintiff lawyer represents a greviously injured client in a case of full liability, where the damages actually owed are limited only to the amount of the insurance coverage. In

many of these cases all he has to do is to collect the face of the policy, and split it with his client. In a $25,000.00 settlement of this nature, a $10,000.00 or $12,000.00 fee for a few hours work is shocking, but it happens just the same.

There is no rhyme or reason for the charges of any plaintiff lawyer who obtains one settlement for $2000.00 for which he receives a $700.00 fee for twenty hours work;—who obtains another settlement for $20,000.00, for which he receives a fee of $7,000.00 for thirty-five hours work—or he receives a settlement for $200,000.00, in which he receives a $70,000.00 fee for perhaps 200 hours work.

In the first instance he would be receiving $35.00 an hour for his services, in the second case he would be receiving $200.00 an hour, and in the last case he would be making $350.00 an hour.

The facts of exaggeration could fill volumes. On the other side of the coin, every day sincere and honest lawyers are settling cases where contingent fees involved turn out to be fair and not exaggerated. These same lawyers some time during the year, if they have any personal injury damage business at all on a contingent basis from one of their regular clients, will make an adjustment by which they will take less than that contingent fee provided in their contract. While this is a commendable thing it bespeaks the basic weakness of such a system. What about those practitioners who obtain such a case through runners, never expect to represent the client in any other business, and care nothing for the equities other than those shown a stranger whom they will never see again, after their case is finished. When the needed adjustment is not made on a contingent fee which admittedly needs adjusting, if fairness is to prevail, where does this injured man turn for redress? Let's be truthful. As a matter of practicality, there is no redress.

I thank God the courts are finally realizing this injustice, and perhaps it is to the courts rather than the American bar, where the responsibility really lies, that the public will finally turn for protection. I turn to the recently confirmed case *Gair v. Peck*.[2] The New York Court of Appeals has confirmed the attempt on the part of the Appellate Division, First Judicial Department, to pass a rule regulating the percentage which lawyers may contract to take from clients as contingent fees in damage cases. Many lawyers are familiar with the long struggle which the court has had to insist that lawyers in its appellate division submit to regulation, not only on their fees in damage cases, but to their conduct in the obtaining and their accounting for the distribution of funds obtained by them for injured clients. This court has felt that contingent fee agreements may result in opportunities for fraud and excessive charges against the public. The court has felt that the cancer of excessive contingent fees and unethical practices in personal injury claims has spread to the very life blood of the present system of personal injury practice and jurisprudence. This court has found that 60 per cent of the 150,000 contingent fee contracts investigated in the City of New York, carried 50 per cent contingent fees. This court has stated that clients worn down by injury, delay, financial need, and with counsel holding the purse strings of the settlement, knowing little about law or lawyers, have not had the stamina to resist in court by hiring other lawyers to be paid out of the other half of the recovery for defending against the excessive fee of the first lawyer.

No truer or more courageous words were ever spoken concerning the existence today of this cancer than those above.

Now in the practice before this appellate court a lawyer must agree to a graduated scale of contingent fees. New York, with a greater general overhead in law offices has set graduated fees higher than they probably should be in other areas, but the principle is a good one. A lawyer files a notice of retainer, in which he must make a full report of the facts concerning his employment. If he handles more than five damage claims a year, he has to explain whether the client was personally known to him and, if not, he has to set out the name of the person who referred the client to him and to give such other information as is necessary to protect the client and the public. Upon the determination of the case he must make a final report to the court, which shall be a complete accounting of all the monies recovered, of how much the lawyers, doctors, investigators, the client, received, and account for all other expenses in the case.

This rule insofar as a graduated scale of fees is concerned should be promulgated by the courts of the United States. That part of the rule which pertains to disclosures and accounting should be promul-

[2]See note 1, *supra*.

gated in all of the largest metropolitan areas and any other areas which have problems concerning the unethical acquisition of damage cases.

To put this part of the rule in effect in many of the rural areas and middle size cities in our country would be an insult to the integrity of the fine bars which we find in these parts of our country. However, I think every lawyer should agree that if any attorney is receiving part of the money recovered in these cases, which should fairly go to the client, the public should begin to receive the protection which it has needed for a long time past from a small segment of the American bar.

Before I finish, I must speak in more detail concerning this proprietorship of damage cases through the loaning of money to the client.

I have been told by authentic sources that there are lawyers in several of the big cities, who have revolving funds upwards of $400,000.00, which are used to finance clients. This practice will some day sound the death knell of the average lawyer insofar as the damage practice is concerned. He is not in a financial position, nor would he consider it ethical to buy business in such a manner. If this practice grows, the average lawyer ultimately will have no representation on the plaintiff side in damage cases.

The unfortunate part of this practice of financing cases is that while certain lawyers who do it follow through with their clients, other lawyers, unethical to the lowest degree, use it to obtain business and, after a few payments have been made, the law suit on file, and their fee firmly guaranteed, stop the financing which they agreed to make in order to obtain the case in the first place. I know personally of an instance in Chicago where an injured person was induced to sign a contract with a firm of lawyers by the promise of $200.00 a month for the duration of her disability. One payment only was made, that on the day that the contract was signed—with flourish and a great show of sincerity. She never received one more dime from this firm as they had agreed. What could she do about it? To go to the Chicago Bar Association would have been futile, in the opinion of those she asked. She was signed up and a lien had been placed against any funds coming to her, so she was caught in a trap. Although she expressed the desire of doing away with this retention, there was no way she could do so. What is the answer for this kind of conduct? The people of the United States who have suffered from it have found there is none and these people are bitter.

One concern I had when asked to write this article was the knowledge that I would again be accused of attacking the lawyers of the United States. Some of those men who have so greatly profited from certain of the activities discussed in this article have constantly and viciously attacked me, because I publicly state my beliefs. I can only say, as I have constantly said, that I refer to a small minority of the American bar who are guilty of excesses and practices which are causing the biggest part of our problem in today's market.

I recognize that in the past and in the future many injured will be helped because of the use of contingent fee agreements with attorneys, fairly executed and fairly administered.

Because of the thirty years of friendship and acquaintance which I have had with thousands of members of the American bar, I know that the great percentage of its members, whether plaintiffs or defendants lawyers, will not be swayed by any motive other than to render their clients the best service in a fair and honorable manner.

Then why should the lawyers of this country allow such practices and proprietorships to take place, so that they not only ruin the future of their own practice, but also allow a cancer to grow which will ultimately bring about the end of damage jurisprudence as we know it today. The Governor of California has now asked his legislature to investigate the possibility of eliminating trial by jury in damage cases. Are we, the lawyers of the United States, going to accelerate the death of our traditional concept of law by sitting idly by while this deterioration of the ethics and duties of the lawyer to his client invades the American bar to its certain detriment?

Some General Observations Concerning Insurance Law*

JOHN VAN VOORHIS
Albany, New York

JUDGE JOHN VAN VOORHIS *is associate judge of the Court of Appeals, State of New York. He is a graduate of Yale and holds LL.D. degrees from Hobart and Union. He has been on the bench since 1937, prior to which he practiced law in Rochester, New York, following his admission to the bar in 1922.*

IT is an honor and pleasure to be invited to speak to the members of the Insurance Section of the New York State Bar Association. This Section has become one of the most significant in the Association One can now get insurance against almost everything except having to listen to after dinner speeches. The world of insurance is so multiple and varied that it includes lawyers and adjusters who wish to economize with the company's assets, selling agents who want every claim to be paid so that their sales will not slump, actuaries who think in terms that are too abstruse to be understood except by other actuaries, go-getters who would be happy if the courts would go farther than they do in deciding that everybody is liable to somebody for pretty nearly everything that can be insured against, men or women who worry where the money is coming from to buy so much insurance, real estate experts, security analysts, trial lawyers, financial lawyers, conservative managers who prefer to stick to well beaten paths and enterprisers who want to compete with Lloyd's more adventurous flights of fancy. In an after luncheon speech I am not supposed to exhaust any subject, least of all my audience before your meal has been digested. I shall therefore confine myself to a few random observations concerning insurance and insurance law.

The accumulation of sound actuarial data in new fields that have to be covered by insurance before there is a body of experience from which rates and coverages can be reliably determined, must be a strenuous task for your clients. Equally challenging must be what happens when risks in old and familiar fields of insurance change, and assume different proportions as a result of changes in habits of people or in decisions of courts. I recently read that malpractice cases against doctors, nurses and hospitals have increased in number by twenty-five times since the end of World War II, and that physicians or their insurance carriers are now paying about $50,000,000 a year in court awards and out of court settlements arising from malpractice claims. My court experience goes back to the time when malpractice cases were almost unknown, for it was seldom possible for a lawyer to get past a nonsuit on account of difficulty in finding doctors to testify against other doctors. Perhaps M.D.'s and D.D.S.'s are not so fraternal these days. The bars have been lowered with respect to how much a plaintiff has to prove to go to a jury in malpractice and other negligence actions. I am glad that I do not have to compute the premiums on malpractice policies. I am also glad that I do not have to compute them on auto indemnity policies. Such negligence cases as I used to try more than 23 years ago, were mostly for plaintiffs, but a prima facie case was something different then.

Last week the United States Supreme Court reversed the dismissal of an action under the Federal Employers' Liability Act on the basis that a railroad employee, whose foot slipped on a railroad tie covered with mud and sleet, had proved a prima facie case against the railroad by showing that the tie was somewhat above the level of the roadbed and that oil was discovered on the tie and on the sole of his boot. The inference appears to have been that the oil came to be on his boot from his having stepped on the tie, that the railroad company was negligent in having al-

*Address delivered at meeting of Insurance Law Section, New York State Bar Association, held at Rochester, October 31, 1959.

lowed the tie to have oil upon it, and that this oil rather than the mud and sleet was responsible for his fall *(Harris v. Penna. R. R. Co.,* 168 Ohio S. 582, reversed *U.S. Law Week,* 10/20/59, Vol. 28, No. 14, p. 3119, Case No. 81). Other cases extending negligence liability could be cited from many of the jurisdictions in the country. It leads to the conclusion in the railroad case, one may suppose, that the United States Supreme Court majority considered that little less than the absolute liability which characterizes workmen's compensation should apply in actions by railroad employees under the Federal Employers' Liability Act. This judicial trend is reminescent of what our State courts used to do soon before the adoption of workmen's compensation, in disposing of defenses based on the fellow servant rule, assumption of risk and contributory negligence in master and servant actions arising from industrial accidents. Then and now courts have modified former precedents by extending liability to satisfy a sense of justice. This tendency is not limited to the introduction by court decision of something akin to absolute liability under the Federal Employers' Liability Act. One wonders whether the trend may be in the direction of absolute liability in the automobile negligence field and perhaps in other fields of negligence law. Current textbooks on negligence lead one to conclude that a number of law writers, at least, regard their subject as antiquated and superseded, and consider that the principal object in studying negligence law is to utilize its principles as surviving legal fictions to rationalize recovery wherever possible. This transformation of American negligence law proceeds from the same philosophy which has recently enlarged liability in workmen's compensation. Absolute liability in negligence cases, if reached by this route, is not qualified by the statutory ceiling on recoveries provided by the Workmen's Compensation Law. If a workmen's compensation system ever takes the place of automobile negligence actions, it will be utilized to enlarge the concept of compensation as general social insurance—not merely to compensate for personal injuries arising from automobile accidents— if the present concepts underlying Workmen's Compensation Law decisions continue to prevail. Whether compensation claims have originated in industrial accidents or occupational diseases is not measured by the same standards as it used to be. As was said in the 1957 Report of the Special Committee of the New York State Bar Association to Study the Workmen's Compensation Law, that Act in the beginning

> "Was not a broad social law *per se* intended to grant social benefits to all citizens of the state, but was a new or substitute legal system of employers' liability adopted in place of the old and unsatisfactory methods of determining such liability" (p. 8).

A parallel extension is being applied to unemployment insurance. In a recent decision it was held that women are entitled to unemployment insurance who give up their jobs in order to marry men living in other communities where equivalent jobs are not available to wives. The board decided against the claim in that instance, but the board was reversed in court *(Matter of Shaw [Gen. Mutual Ins. Co.—Rubin]* 5 N.Y. 2d 1014).

Insurance policies have been progressively broadened in interpreting their coverage. A few years ago a question of fact was held to have been presented in an action on a life insurance policy providing that double indemnity should be paid if death resulted independently of all other causes from bodily injuries sustained solely through external, violent and accidental means. This policy contained the customary condition that death shall not have occurred "as the result or by the contribution * * * of disease or of bodily or mental infirmity." The insured had a heart condition, but it was the contention of the benficiary that the heart attack from which he died was precipitated by a fall. An autopsy disclosed that when he died his heart had become enlarged to one and one-half times its normal size, and that the largest of his coronary arteries was so constricted by arteriosclerosis that a probe the size of the lead in a pencil could not be inserted into it, whereas normally the whole pencil would have fitted into this artery. At the time of his death only a trickle of blood could pass through this major blood vessel. No witness disputed these finding by the coroner. Nevertheless, it was held that a question of fact was presented concerning whether the insured suffered from heart disease at the time of his death contributing to his fatal coronary thrombosis or occlusion *(Kleinman v. Metropolitan Life Insurance Company,* 298 N.Y. 759).

Such decisions, and others of similar import in insurance fields, are prompted by humanitarian instincts, but the results are not necessarily humane. The encouragement to litigation which is implied promotes fictitious claims and prompts business and professional men and women to think of possible tort liability ahead of service to customers or clients. This side of the coin is illustrated by the circumstance that the doctor-patient relationship, for example, may not operate to the best advantage if the doctor is obliged to regard his patient primarily as a potential adversary in court. In extremity, it is not in the best interest of a patient to encourage doctors to let the patient die by routine methods if there is a chance of recovery, as well as of liability, by adopting some promising but not yet fully tested remedy. Nor is it advisable, one might surmise, to encourage doctors to dispense with nurses or other assistants at operations, who might be adverse witnesses in court if hindsight proves that mishaps might have been averted. That is the sort of thing which may be expected to occur if what used to be called errors in judgment become the basis for tort liability.

In workmen's compensation, it is not on the side of humanitarianism to make it difficult for physically or mentally handicapped persons to obtain employment by visiting upon the prospective employer, if the applicant is hired, most of the ills that flesh is heir to under the guise of liability for industrial accidents or occupational diseases. The Special Fund for disability following previous impairment is by no means a complete answer to this difficulty. Nor, it may be added, does payment of workmen's compensation to those who do not come within the original intention of the law improve the possibility of raising the statutory maximum above the present $45.00 per week. Employees who have meritorius cases cannot be paid as much as they deserve, if money which could be allocated to them by statute is spent upon other claimants who only by grace of some legal fiction have sustained occupational diseases or industrial accidents. In his second report as Moreland Act Commissioner made to Governor Harriman last December, former Justice Joseph M. Callahan of the Appellate Division, First Department, said concerning this (pp. 7-8):

> "We must make up our minds whether we are satisfied with a system which is more generous than our neighbor's in making awards on claims not recognized elsewhere and allowing free choice of doctor without state supervision of medical care or assurance of rehabilitation, but which gives the injured workman far less than the two-thirds of his average pay promised under the law. Would it not be better for a workman averaging a weekly pay of $100 if the maximum benefits were $66.66 a week rather than $45 a week as at present? That the present $45 figure is unrealistic becomes clear when we reflect that $45 it two-thirds of $67.50, and that the average weekly wage in New York is now substantially higher than that; $89.63 in fact."

Judge Callahan says that the costs of workmen's compensation in New York are higher than in any other state in the country, but that the awards in meritorius cases are lower than in the other jurisdictions which he has examined.

The case of *Masse v. Robinson Co.*, 301 N.Y. 54, and others in its succession, bringing the consequences of heart disease within the coverage of workmen's compensation insurance, has developed a new theory of accident, no longer confined to a single catastrophic incident identifiable in space and time. This prompted the New York State Bar Association's committee to remark:

> "Under the older concepts the claimant told his story, the trier of the facts determined whether there was an accident, and if there was the case then became one for medical opinion as to whether the injury was due to such accident.
>
> "Under the new theory the responsibility for determining the fact of accident is shifted initially to the employee's doctor who is not present during the man's employment, and the payment of whose fee is, in many cases, dependent upon a finding that the claim is compensable" (p. 23).

This, said the committee, "removes the basic judging process from the realm of law * * *" (p. 23). That statement is especially true if the presumption in favor of the claimant under section 21 of the Workmen's Compensation Law is pressed to the limit as it frequently is. A heart or cancer condition not connected with employ-

ment may mark an employee for early death, but this is not taken into account if death is found to have been accelerated by so little as a day or even an hour by a work connected incident.

I am not decrying remedial social and economic legislation, but in so far as we adopt the welfare state I believe that we ought to recognize it as such and pay for it accordingly. Desirable forms of public and private insurance, in the words of Sir Winston Churchill, have brought the magic of averages to the relief of millions. It seems to me that measures of this kind should not be introduced indirectly, however, by extending tort, workmen's compensation and other forms of legal liability to situations where, according to previous conceptions, the condition is not really due to industrial accident or occupational disease, or to situations where, in case of torts, the person charged with wrong has really done no wrong but is free from actual fault. Doing that obscures what is really happening. It beclouds the computation of the cost of social insurance and results in an inequitable distribution of the benefits and of the burden of meeting the cost. That goes beyond substituting new or better legal systems in place of old and unsatisfactory methods of determining liability. It is really the introduction of a form of general social insurance without counting the cost, and by apportioning the benefits and the cost at haphazard.

If a delivery man slips and falls on your doorstep instead of mine, there is no reason why you—or your insurance carrier—should pay the social loss, while I go scot-free, unless the doorstep was really bad enough to have needed to be repaired. If a workman dies from heart disease or cancer while working for you, there is no reason on account of which the whole social responsibility should rest on you or on your carrier. I am not discussing how much responsibility for the sick, the impoverished or the disabled should be assumed by society at large, but am saying that responsibilities of that nature which are assumed should rest on society as a whole and be assessed according to some equitable and practical pattern. And the benefits should reach all who are entitled to receive them, not an ingenious or unscrupulous few.

I suppose that everyone favors cradle to the grave security except when it comes to paying for it. Meeting the cost is a problem that has to be faced and solved on the merits. We cannot fight the problem or run away from it by extending liability for tort or workmen's compensation on no better warrant than the creation of a legal fiction that certain individuals or corporations are wrongdoers who are not really tort feasors, or by characterizing all the afflictions of mankind since Adam and Eve as industrial accidents or occupational diseases. You may recall what Adam said to Eve when they were driven out of the Garden of Eden, "My dear, we are living in an age of transition."

One phase of this uncertain and fortuitous basis for liability is what the state bar committee called the consequent removal of "the basic judging process from the realm of law." This, the committee said, negates underlying concepts of insurance, for the reason that, "Insurance is predicated on a reasonable ability to predict future liability." The insurance companies seem to have met this quandry by writing comprehensive policies in language so obscure as probably to cover all eventualities, and by raising rates accordingly.

The question of court review, as in the case of all administrative law, is troublesome and difficult. Reversals of board rulings are few and far between. Courts and boards are often actuated by the same underlying conceptions of policy. The extent of the power vested in boards and administrators is illustrated by the difference in holdings in heart cases in instances of public employees under the state retirement system and in the field of workmen's compensation. The State Comptroller is empowered to decide questions of fact in the former, whereas the Workmen's Compensation Board has the power of judging in the latter. A forest ranger who had previous heart trouble died in the line of duty after fighting a raging brush fire. The State Comptroller held that by overtaxing his heart, this man did not sustain an "accident" within the meaning of the retirement allowance statute. This determination was sustained when reviewed in court, on the ground that the comptroller was authorized to decide questions of fact, and that his decision would not be disturbed that this death did not result from an accident *(Matter of Croshier v. Levitt,* 5 N.Y. 2d 259). In *Massee v. Robinson Co.,* it was held that the courts would not disturb an opposite finding by the Workmen's Compensation Board, than an employee's heart failure arose from an industrial accident.

These two decisions illustrate how far removed the courts have become from the actual determination of such controversies, and how unpredictable are the results except as one may know and understand the underlying tendencies of the board or administrator having the real power of decision. The situation, familiar elsewhere in administrative law, illustrates that in spite of the quantity of talk about the desirability of the rule of law we constantly are getting farther away from it. In his second report to Governor Harriman, Judge Callahan recommends eliminating court review in workmen's compensation cases if his entire program is adopted. If the rest of his program is not enacted, however, Judge Callahan repeats his former recommendation that judicial review be enlarged.

The concentration of nearly absolute power in boards or officers without prescribing anything except the most general standards or guides has resulted from pressures of the times. We demand baseball czars in order to function smoothly in government as well as in baseball. There are many "empires," as they are called in the language of the street, within the national, state and local governments, most of which function without much relation to the others. Court review of administrative rulings is too large a subject for present discussion, but I cannot take leave of it without citing an illustration of how powerful are the forces driving us toward a government of men rather than a government of laws. No modern lawyer or jurist has been more sincerely or articulately aware of the advantages of the rule of law than the late Chief Justice Charles Evans Hughes. Yet it was Hughes, more than anyone else, who was responsible for the creation of the office of Superintendent of Insurance. The Insurance Investigation marked the beginning of Hughes' illustrious career. Everyone knows that a Superintendent of Insurance with very broad powers is an absolute necessity. Not only in insurance, however, our whole polity is moving in that direction. My point is not to criticize the superintendent or his powers, nor to question his wisdom in exercising them or his necessity, but to note in passing that this great officer and his counterparts in other branches and at other levels of government, wise and indispensible as they may be, are not the best evidence that we live under a government of laws and not of men.

How Insurance is Used by Closely Held Corporations*

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THIS short address will highlight the various ways in which life insurance is being used by closely held corporations.

Stock Redemption or Buy-Out Agreements

One of the primary uses of life insurance is in connection with stock redemption agreements. The objective is to assure orderly passage of stock ownership at the death of an owner of stock in a closely held corporation.

Owners of stock of closely held corporations are increasingly recognizing that a lifetime of creative effort is represented by their stock ownership in one or more close corporations. Many of us have seen examples of how this effort, of great value before death, has vanished at death because a client did not carry out recommended arrangements for transfer of the business interest at the crucial time.

The requisites of such orderly transfer are not complicated and require the existence, basically of three things, with which, I believe, you are all familiar:

First, there should be in existence either (1) a binding stock redemption agreement among the various owners of a business and the corporation requiring each person's estate to sell his stock at death to the corporation, or (2) a binding buy-out agreement requiring the decedent's estate to sell his stock to the surviving owners. The stock redemption agreement is more widely used than the buy-out arrangement because corporate funds are used and income taxation to the interested parties is avoided, as we'll see in a moment.

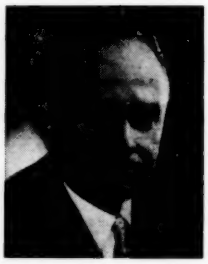
Second, there should be in existence an adequate provision in the agreement fixing a fair value at which the stock interest is to be transferred. Without this price fixing, the whole objective of the agreement fails.

Third, sufficient cash must exist at the appropriate time to make certain that the price fixed in the agreement can be paid. Obviously, without cash the agreement cannot be carried out.

Life insurance obviously provides the third necessary fact. Before you advise your client that its use is appropriate, however, you will want to ask yourself and answer the following legal questions assuming the corporation is to own the policies, to be the named beneficiary under the policies and will pay the premiums:

1. *Are the life insurance proceeds subject to income taxation when received by the corporation?* The answer is "no" on the basis of the specific exemption from taxation of life insurance proceeds in the Internal Revenue Code.[1]

2. *Do the premiums paid by the corporation constitute an allowable deduction?* The answer is "no" again on the basis of a specific provision in the Internal Revenue Code.[2]



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*Presented at the meeting of the Insurance Law Section of the New York State Bar Association in New York City on January 25, 1960.

[1] I.R.C. §101 (a) (1).

[2] I.R.C. §264 (a) (1), & Friedman & Wheeler Stock Retirement Agreements Funded by Life Insurance, Taxes, The Tax Magazine, October 1959.

3. *Will your client, the insured, be required to include the premiums paid by the corporation in his taxable income?* This answer was in doubt for some period of time but has now been settled in the negative, and the Commissioner of Internal Revenue has announced his acquiescence in this result.[3]

4. *When the stock of the insured is redeemed, will there be a taxable dividend to the remaining shareholders?* The answer is "no" on the basis of the *Holsey* decision.[4] The basis of this answer is that the remaining shareholder hasn't realized any taxable gain just because he ends up owning all the stock in a corporation whose assets had been depleted by the amount paid for the redeemed stock. The commissioner has also announced his acquiescence in this result.[5]

5. *Can the insurance policy be referred to in the stock retirement or buy-out agreement without fear of adverse income tax consequences?* The answer is "yes"[6] provided the policy is owned by the corporation and its cash value and proceeds at death will be available for satisfying general creditors of the corporation, if so needed. In all cases, the amount to be received by the shareholder or his beneficiaries should be contingent upon surrendering his stock to the corporation.

6. *Can the individual beneficiary be named in the policy as the beneficiary of the proceeds?* The answer is "yes" if the proceeds are to be clearly applied in redemption of the stock.[7]

7. *Is there danger that the purchase of insurance by the corporation will result in the imposition of an accumulated earning's tax?*[8] In 2 cases where substantial sums were accumulated and used to redeem stock of shareholders, the penalty tax was imposed.[9] In neither case was insurance purchased. It may be that these cases indicate that the way to avoid the accumulated earning's tax is to buy insurance in view of the fact that the use of insurance requires less cash to be accumulated. In any event, there are cases[10] supporting the view that the purchase of insurance has a reasonable business purpose when such insurance is designed to provide for continuity of management. My personal view is that this proposition will one day be firmly established in the law.

8. *What kind of taxation will be imposed on the amount that is received by an estate for the redeemed stock?* So far as income taxes are concerned, there should be none since the stock would be valued for estate tax purposes at the fair market value prices fixed in the agreement. Therefore, the basis of the stock would be such fair market value. The amount received would be identical to the basis, hence, there would be no taxable income.

In order to secure this result, however, you will want to make sure that compliance with the technical requirements of a complete redemption or a disproportionate redemption or a partial redemption are met.[11] In connection with the first two, particular attention will have to be given to the attribution rules.[12]

In the third type of redemption, that is a partial redemption, a guaranteed way is available of getting out accumulated earnings and profits of a corporation at no tax. The amount that can be taken out without tax is limited to the amount of estate taxes that must be paid by the estate and funeral administration expenses, but these sums can be substantial. It is one of the few ways in which earnings can be taken out without taxation and should not be overlooked.

9. *What price is to be fixed in the agreement for the stock redeemed?* The answer to this question depends on the type of corporation that is involved. One way is to set a fixed value for the entire corporation, and to provide for periodic revision of the price. This way is all right if the price is

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[3]Oreste Casale, 247 F.2d 440 (2 Cir., 1957), reversing 26 T.C. 1020 (1956); Henry E. Prunier, 248 F.2d 818 (1 Cir., 1957), reversing 28 T.C. 4 (1957); and Sanders v. Fox, 253 F. 2d 855 (10 Cir., 1958), reversing 149 F. Supp. 942 (D.C. Utah, 1957); TIR 115 (12-8-58); For an excellent discussion of this entire subject see Lawthers "Stock-Redemption Arrangements for Death", Winter, 1959 C.L.U. Journal, 31.

[4]Holsey v. Commissioner, 258 F. 2d 865 (3 Cir., 1958), reversing 28 T.C. 962 (1957).

[5]TIR 109 (12-30-58); Rev. Rul. 58-614, 1958-2, C.B.920. See also Rev. Rul. 59-286, I.R.B. 1959-36,9.

[6]See cases and rulings cited in previous footnotes.

[7] Rev. Rul. 59-184, I.R.B. 1959-21,8; Rev. Rul. 59-79, I.R.B. 1959-11,8.

[8]I.R.C. §531-537.

[9]Pelton Steel Casting Co. 251 F. 2d 278 (7 Cir., 1958), affirming 28 T.C. 153 (1957); Mountain States Steel Foundries, 24 T.C.M. 1959, 59.

[10]Prunier and Sanders, *supra*, and Emeloid Co. v. Commissioner, 189 F.2d 230 (3 Cir., 1951) reversing 14 T.C. 1295 (1950).

[11]I.R.C. §302 and §303.

[12]I.R.C. §302 (c) and §318; Rev. Rul. 59-233, I.R.B. 1959-28,9.

in fact periodically revised. Another way is to set a specific standard for valuing each important asset—cash at 100%, receivables at 80% or 90% of book value, etc. The question will also arise as to whether the full insurance proceeds should be included in the price of the stock, or whether only the cash value at date of death should be included. My personal opinion is that either course can be followed. In a strict family situation, it may be desirable to include the insurance in the price to be paid, particularly if it is important that the price paid be accepted by the Internal Revenue Service as the value to be put on the stock that is being redeemed.[13]

In summary, there exists a sound legal basis for the use of insurance in connection with stock retirement and buy-out agreements. However, there are many individual problems to be considered in all cases and your careful attention as lawyers to these matters is essential.

Deferred Compensation Agreements

Insurance is also widely used in connection with deferred compensation agreements. The typical case might involve a man whose salary can be increased by $10,000, but such an increase would leave him only $4,800 after taxes. This result would occur for a man, age 45, married and already with an income of $32,000. After the problem is reviewed, the corporation and the employee agree to enter a deferred compensation contract under which the corporation agrees to pay benefits to the employee at a later date, such as at retirement. Let us assume that the corporation agrees to pay the employee upon retirement, at age 65, $20,000 a year for 10 years.

In order to fund this eventual obligation, corporations frequently take the $4,800 that it would have cost the corporation to pay an additional salary of $10,000 and spend that amount on a life insurance policy or an endowment policy at age 65. If it is assumed for the moment that an endowment at age 65 is purchased, the corporation would begin to receive $11,750 a year under the endowment contract at age 65 and would continue to receive that amount annually for ten years.

Of this sum, approximately $10,000 can be excluded from the corporation's income as a return of its "investment in the contract."[14] The corporation then pays the $20,000 annually to the employees under the deferred compensation contract.

Since the tax cost to the corporation of the $20,000 payment would be only $9,600 ($20,000 minus the 52 per cent corporate tax), the $10,000 received from the insurance company and excluded from the corporation's income, more than offsets cost-after-taxes of the $20,000 annual payment to the retired employee.

Thus, the employee would get the $20,000 a year under the deferred compensation arrangement. This sum compares with $11,750 a year if he bought the endowment at age 65 contract out of the $10,000 increase in immediate compensation paid him between ages 45 and 65.

Of course, the tax the employee must pay on the full amount of the benefits paid to him by the corporation would be higher than the amounts paid to him under the endowment contract directly from the insurance company. But even after payment of higher taxes, the employee's net retained income over the ten year period is 40% or 50% higher than if he had bought the endowment himself.

In addition, the deferred compensation contract can provide for payments to the widow if the employee dies before his retirement. The purchase of this insurance can make it easier for the corporation to discharge these payments. For instance, if the employee dies after premiums have been paid for only ten years on an endowment at 65, the corporation receives just over $10,000 a year for a ten-year period from the proceeds ($83,500 face value, plus dividends, at current rates, not estimated or guaranteed, and interest of $6,700).

Since about $9,500 of the $10,000 would be nontaxable, the corporation would pay about $20,000 to the widow for ten years at no extra cost to itself. Of course, tax consequences to the estate of the deceased employee by reason of the widow's right to receive such payments should be considered.[15]

Waiver of Premium Provision

Sometimes a corporation prefers to purchase insurance with a waiver of premium provision. Then, if the employee becomes disabled, substantial sums can be paid to

[13]See Regulation §20.2031-2 (h)

[14]This is the Internal Revenue Code term for tax "cost"; See I.R.C. Section 72 (c) (1).

[15]See, Goodman v. Granger, 243 F.2d 264 (3 Cir., 1957).

him, without cost to the corporation. Thus, where a premium of $5,000 is waived because of the insured's disability, the increase in the cash value of the policy after its early years might approximate this amount. The corporation can make a payment of $10,000 to the employee (costing it only $4,800 after taxes of 52%). Such cost may be less than the increase in the cash value of the policy in the year.

An Important Caution

The deferred compensation contract must be drafted so that the employee does not receive any vested rights in any particular year. Otherwise, the value of such rights might be taxed currently to him. In this connection, it is generally thought that the contract should set forth real conditions which must be fulfilled by the employee if his rights under the contract are not to be forfeited. Continued work for a specific period or until a specified age has been accepted as sufficient to make this right forfeitable.[16] Nothing should be done to provide a basis for the contention that the employee has in effect an enforceable right to receive payments from the insurance company, rather than solely from the employer.

Split Dollar Plans

A third method of using life insurance involves the so-called split dollar or split premium plan. The plan is simple.[17] A corporation applies for a life insurance policy on the life of an employee, and the policy is issued with the corporation as the owner.

The employee usually pays the first year's premium.

Thereafter, the employee pays the difference between the total premium and the increase in the cash value of the policy. The company pays the premium to the extent of the increase in the cash value. The company is named beneficiary to the extent of the cash surrender value and the employee's wife or other dependent is named beneficiary of the proceeds in excess of the cash surrender value. Accordingly, the company always gets back its investment and the employee's family is protected at minimum cost to him. Usually, under a regular split dollar plan, after the third or fourth year, the employee's cost is down to $1.00 or $2.00 per thousand and in the seventh or eight year the employee may stop paying any premium at all.

Revenue Ruling 55-713[18] has made it clear that the following income tax results would be reached with respect to a split dollar plan.

1. The employee will not be taxed on the premiums paid by the corporation or on the value of the corporation's money which is, in effect, put to use for the benefit of the employee.
2. Any life insurance proceeds received by the corporation will not be subject to income taxation.
3. Any life insurance proceeds received by the employee's beneficiary will not be subject to income taxation.

So far as estate taxation is involved, the amount payable to an employee's beneficiaries would usually be included in the employee's taxable estate. This is because it is usually provided in a split dollar policy that the beneficiary cannot be changed without the employee's consent. This amounts to a retained incident of ownership. If an irrevocable beneficiary is named and the employee otherwise retains no incidents of ownership in a split dollar policy, estate taxation of the proceeds may be avoided.

A question frequently arises. Does the tax protection afforded by Revenue Ruling 55-713 apply to a majority stockholder-employee, or to a close relative of his? On the basis of private letter rulings issued by the Internal Revenue Service, the answer is "no." The facts upon which Revenue Ruling 55-713 was based did not contemplate either a majority stockholder-employee or a close-relative situation.

However, lack of protection by a ruling does not necessarily mean that there will be adverse income tax consequences. The worst that could happen, as I see it, is that the Internal Revenue Service might try to tax as income to such stockholder-employee the economic value of the money paid by the corporation which is being put to the employee's use, measured either by reasonable interest on such money or by a one year renewable term premium rate multiplied by the amount of insurance offered the employee (the face amount less

[16]Fred C. Hall, 15 T.C. 195 (1950) affirmed 194 F.2d 538 (9 Cir., 1952); James D. Mooney, 9 T.C. 713 (1947); Harold C. Perkins 8 T.C. 1951 (1947); Julien Robertson, 6 T.C. 1060 (1946).

[17]Split Dollar—Simple & Useful by Paul Green, Jour. of Amer. Soc. of C.L.U. (Summer, 1956, pg. 198).

[18]1955—2 C.B. 23.

the cash value), minus any portion of the total premium paid by the employee. Conversely, an attempt might be made to disregard the corporate entity and to tax the entire amount of any premium to the stockholder-employee. Such disregard of the corporate entity does not, however, appear to be sanctioned by decisions of the Supreme Court of the United States and other courts.[19]

As in all things, there are wrinkles which develop on tax savings devices as their use expands. One of the most popular variations is to have the corporation pay all the premiums on the policy including the first year premium. The individual never has to pay any of his own money for the insurance protection that he is getting. If this variation is used, the corporation is, of course, made the beneficiary of the policy to the extent of the premium paid by it so that at all times the corporation is fully protected with respect to the amount paid out by it. The corporation is the record owner of the policy but provision is made for not changing the beneficiary designation without the written consent of a specified person. This avoids the problem of having the employee pay the premium on the first year under the usual plan, when there is little or no cash value.

Other entities having available cash reserves, such as partnerships, associations and trusts are also purchasing insurance on a split dollar basis. In this way no investment of the insured's own cash reserves is required.

The split dollar plan is made more attractive by another variation which is designed to avoid estate taxation of the proceeds. Under this variation, the wife and children are made the irrevocable beneficiaries of a policy with the corporation owning the policy. The beneficiaries are protected by including a provision in the policy that the beneficiaries cannot be changed without their consent, such as the consent of the wife while living, or in the event of her death of any children who might be named as the contingent beneficiaries. Since the corporation owns the policy, and the insured has no incident of ownership in the policy, it is thought that no portion of the proceeds would be includible in his taxable estate.[20]

[19]Moline Properties Inc. v. Commissioner, 319 U.S. 436 (1943); Bonwit, 87 F.2d 764 (2 Cir., 1937); Wilson v. Crooks, 52 F.2d 692 (D.C. Mo. 1931).

[20]I.R.C. §2042.

Payments by Corporations to Widows

A fourth use of insurance is in connection with direct payments by the corporation to widows of former employees. A section of the Internal Revenue Code[21] permits a corporation to make an income tax-free payment of $5,000 to an employee's beneficiary on the employee's death.

The law does not require that the corporation buy insurance to provide the $5,000 payment, but how insurance can be used to do so is of considerable interest.

The $5,000 payment by a corporation in the 52% tax bracket would cost the corporation $2,400. That is, $5,000 minus the 52% tax, or $2,600 that the corporation would have paid on the $5,000 if it had been retained and not paid to the employee's beneficiary and, therefore, not deducted as an expense. If the corporation had purchased insurance to fund this payment at a time when the employee was 40 years old, and the employee dies at 65, the corporation would receive $5,000, or $2,600 in excess of the $2,400 net cost to it of the $5,000 payment. The net premium cost for 25 years might have approximated $3,000. Thus, the corporation would have spent only $400 over the 25 year period for the $5,000 payment.

From the employee's viewpoint, the arithmetic of such an arrangement seems rather compelling. For a very small cost to the corporation, $5,000 is provided income tax-free for the employee's beneficiaries. $5,000 equals $10,000 taxable salary to an employee in a 50% tax bracket. It also equals $20,000 tax-free corporate income for a stockholder-employee, already getting a maximum salary, and who could only receive more from the corporation through dividends.

You may ask whether payments in excess of $5,000 can be made. This concept is related to the voluntary salary continuation plans under which the employer makes voluntary payments to the widow of an employee who dies prematurely. The answer is "yes" [although voluntary continuation plans usually involve a payment of much more than $5,000.] Insurance is frequently bought in connection with these plans with the idea of making the payments easier for the corporation. The insurance proceeds can be used for this purpose, or, if the corporation prefers at the time, can be retained for corporate purposes. In the latter event, the insurance is classifi-

[21]I.R.C. §101 (b)

able as key-man insurance, that is, insurance which reimburses the corporation for the use of a valuable key-man.

There have been many litigated cases on whether the payments to the widow in excess of $5,000 constitute taxable income to her and are taxable deductions to the corporation.

As to the taxability of the amounts in excess of $5,000 to the widow, there is a split of authority at the present time under the 1954 Internal Revenue Code, because of the existence of the specific provision in the Code for a $5,000 exemption. In the 2nd and 4th circuits indications are that amounts in excess of the $5,000 would probably be construed as taxable income.[22] However, the only decided case under the 1954 Internal Revenue Code has held that any amounts paid in excess of $5,000 are not taxable.[23]

Furthermore, in any cases arising under the 1939 Code, a whole series of cases have now held that payments in excess of $5,000 are non-taxable.[24]

As to the corporation's taxable deduction for payments to a widow, it is quite clear that payments equal to 2½ years of one's salary, even though spread over a much longer period, will ordinarily be deemed to constitute reasonable and necessary deductions.[25]

Insured Pension and Profit-Sharing Plans

Insurance is also bought by pension trusts and profit-sharing plans to provide insurance coverage for an individual on a favorable income tax basis. Among others, important tax principles to bear in mind in this connection are that (1) the entire death benefit payable under an individual policy of insurance purchased by a trustee under a qualified non-contributory employee's trust, payable to a named beneficiary is excluded from the insured-employee's taxable gross estate and is exempt from estate taxation; (2) there is income taxation at capital gains rates only on the cash value of the policy immediately before death which is in excess of the $5,000 tax-free death benefit and any portion of the insurance protection cost that was previously taxed to the individual during his lifetime.[26]

Group Insurance

Group insurance is another method of using life insurance, its attributes are so well known that it needs little elaboration. Briefly stated, premiums paid by the employer are a deductible business expense and the proceeds received by the employee's beneficiaries are free from income tax. In addition, many individuals are assigning their group insurance certificates to others in the belief that the insurance proceeds will be kept out of the insured's taxable estate. Whether this belief is justified and will, if tested, be sustained by the courts is not now known.

Summary and Conclusion

There are many different ways in which life insurance is used by closely held corporations. This short review deals briefly with six of them—insurance to fund a stock retirement or buy-out agreement, insurance to fund a deferred compensation agreement, insurance under a split dollar plan, insurance to fund payments to widows, insurance under insured pension and profit-sharing plans and group insurance.

In the main, the use of life insurance enables the attainment of a desirable business objective. At the same time, its use often enables substantially greater capital formation by the individuals whose lives are insured and the business associates and beneficiaries of such insured individuals. Although some people claim that understanding its use and related tax principles are much too involved, I believe that such understanding can readily be obtained. If this brief memorandum has aided you in this endeavor, it has served its purpose.

[22] See Rodner v. United States, 149 F.Supp.233 (S. D.N.Y.1957) and Bounds v. United States, 262 F. 2d 876 (4th Circuit, 1958).

[23] Reed et al., v. United States, 177 F.Supp.205 (W.D.Kentucky, 1959) Appeal to the 6th Circuit now pending.

[24] Louise K. Aprill, 13 T.C. 707 (1949); Alice M. MacFarlane, 19 T.C. 9 (1952); Ruth Hahn, 13 T.C. M. 308 (1954); Estate of Ralph W. Reardon, 14 T.C.M. 577 (1955); Marie G. Haskell, 14 T.C.M. 788 (1955); Estate of Arthur W. Hellstrom, 24 T. C. 916 (1955); Ethel Gregg Mann, 16 T.C.M. 212 (1957); Estate of John Hekman, 16 T.C.M. 304 (1957); Estate of John A. Maycann, 29 T.C. 81 (1957; Rodner v. United States, *supra*. The internal Revenue Service has indicated in Rev. Rul. 58-613 (1958-2 C.B. 914) that it will not contest the tax-exempt status of payments made to widows in years governed by the 1939 Code, if the intention of making a gift is clearly shown.

[25] I. Putnam, Inc. 15 T.C. 86 (1950); Rev. Rul. 54-625, 1954—2 C.B. 85; Rev. Rul. 55-212, 1955—1 C.B. 299; Reg. §1.404(a)-12; McLaughlin, Gormley, King Company, 11 T.C. 569 (1948).

[26] I.R.C. §401 et seq. and §2039(c) and related regulation sections.

Indemnity Suits By Vessel Owner Against Stevedoring Contractor: A Search For The Limits of The Ryan Doctrine

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POSSIBLY no problem connected with the volatile field of maritime personal injury law currently presents a more active area of litigation than that involving suits for idemnity by vessel owners against independent stevedoring contractors. The stage was set for such a development by a group of decisions by the Supreme Court of the United States extending the warranty of seaworthiness to a class of workers which had been consistently regarded as strangers to the rigors inherent in the work of those who went down to the sea in ships. In *Seas Shipping Company, Inc. v Sieracki,*[1] the Supreme Court of the United States initiated this unprecedented course by holding that longshoremen were entitled to the warranty of seaworthiness. In *Pope & Talbot, Inc. v. Hawn,*[2] the Supreme Court of the United States further extended the warranty of seaworthiness to cover a carpenter who was temporarily working aboard ship. An excellent discussion of these and other decisions which incalculably broadened the liability exposure of vessels in personal injury litigation, is contained in an article entitled *"Shoreside Maritime Workers and the Warranty of Seaworthiness",*[3] appearing in the January, 1955 issue of this publication. Contemporaneous with these developments was a determination by the court in *Halcyon Lines v. Haenn Shipceiling & Refitting Corp.*[4] that the vessel could not seek contribution from an independent stevedoring contractor as an avenue to mitigate its new and judicially created exposure.

In 1956, the Supreme Court of the United States developed an "all or nothing" relief for the vessel by way of indemnity in the landmark decision of *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.*[5] An excellent review of the decisions relating to this question prior to the *Ryan* case and a detailed discussion of the *Ryan* case itself is contained in an article appearing in the April, 1956 issue of this publication entitled, *"Stevedoring Agreements and the*

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[1]328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946).
[2]346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1953).
[3]22 Insurance Counsel Journal 95, written by Benjamin W. Yancey, New Orleans, Louisiana.
[4]342 U.S. 282, 96 L.Ed. 318, 72 S.Ct. 277 (1952).
[5]350 U.S. 124, 100 L.Ed. 133, 76 S. Ct. 232 (1956).

Warranty of Workmanlike Service."[6]. On two occasions subsequent to the rendition of the *Ryan* opinion, the Supreme Court of the United States again considered the indemnity question in *Weyerhauser Steamship Co. v. Nacirema Operating Co., Inc.,*[7] and *Crumady v. Joachim Hendrik Fisser.*[8]

This article is an attempt to chronologically review the legal developments in connection with the indemnity question. It begins with a detailed review of the *Ryan* decision, continues through the approach taken to that decision by the lower courts leading to the opinion in the *Weyerhauser* case, covers the significant cases subsequent to *Weyerhauser* leading to the exposition by the court in the *Crumady* case, and concludes with the leading cases handed down subsequent to the *Crumady* opinion.

The Ryan Case

Ryan Stevedoring Company, Inc. agreed to perform all stevedoring operations required by Pan-Atlantic Steamship Corporation in connection with its Atlantic and Gulf coast service for a period of one year. *There was no formal contract between the parties* and the arrangements were contained in a series of letters and informal memoranda.

One of Pan-Atlantic's vessels, the SS CANTON VICTORY, was loaded at Georgetown, South Carolina with mixed cargo, including rolls of pulp paper which were four feet in diameter, approximately three to five feet long, and weighed in the neighborhood of 3200 pounds each. A layer of rolls was placed side by side on the hatch floor, and other rolls of the pulp paper were "nested" on top of them. Wooden chocks or wedges were used to immobilize the rolls thus stored.

The vessel left Georgetown, South Carolina, and within a few days reached Brooklyn, New York, where a longshoreman, Palazzolo, was injured when struck by a roll of the paper during a discharge of the vessel's cargo at that port. Palazzolo instituted suit in the state court of New York; Pan-Atlantic removed the suit to the United States District Court for the Eastern District of New York, and impleaded Ryan Stevedoring Company seeking full indemnity for any damages awarded to Palazzolo.

In connection with the longshoreman's suit against the vessel, the jury was charged as to both unseaworthiness and negligence. *It was agreed by the parties that the indemnity question would be decided by the court* on the record as developed in the suit between Palazzolo and Pan-Atlantic. *The jury returned a general verdict in favor of the plaintiff against Pan-Atlantic Steamship Co., and the trial court held that the jury verdict indicated that both the steamship company and the stevedore contractor were a joint tort feasors and that under such circumstances an action for indemnity would not lie.*[9]

The trial court determined that there was sufficient evidence to justify a finding of negligence on the part of Pan-Atlantic by the jury, as well as finding that the vessel was unseaworthy. The court seemed to indicate[10] that if the jury had found only that the vessel was unseaworthy and that the stevedoring contractor had "created" the unseaworthy condition which visited liability on the vessel, that the steamship company would be entitled to indemnity.

There was testimony in the record that the chocks which were used to secure the rolls of pulp paper were generally carried aboard the vessel as part of the ship's gear. The record was clear that the cargo officer had general supervision over the loading operations, and the opinion further indicates clearly that the cargo officer in the ship had no *actual knowledge* of any defect in the chocks.

The court apparently had no doubt that the stevedoring contractor was guilty of negligence in improperly loading the cargo, but further finds that "the cargo officer in the exercise of reasonable care *should have discovered and corrected* the condition." The court's holding on the indemnity question is concisely stated as follows:[11]

> "Captain Fischer's own testimony shows his complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or

[6]23 Insurance Counsel Journal 170, written by Stanley B. Long, Seattle, Washington.
[7]355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438, (1958).
[8]358 U.S. 423, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959).
[9]111 F. Supp. 505, 507 (1953).
[10]111 F. Supp. 506.
[11]111 F. Supp. 507.

halt the work. Consequently, it is my conclusion that while Pan-Atlantic was guilty of a lesser degree of fault than Ryan, it was, nevertheless, a joint tort feasor, and under such circumstances, a contract of indemnity cannot be implied on the part of Ryan."

The vessel owner appealed to the Second Circuit Court of Appeals, and that court affirmed the trial court insofar as the longshoreman's recovery against the vessel was concerned, but reversed the trial court's holding on the indemnity question, and held that the improper loading of the vessel by the stevedoring contractor was the primary cause of the injury sustained by the longshoreman and that the vessel owner was entitled to full indemnity, even though there was no express contract of indemnity between the vessel owner and the stevedoring contractor.[12]

The Second Circuit granted indemnity on the basis that Ryan "created" the hazardous condition leading to the longshoreman's injury, and that its negligence was the *"sole", "active",* or *"primary" cause* of the accident. The substance of the court's decision reads as follows:[13]

"Judgment on the action for indemnity over was awarded to Ryan. We think this error. The trial judge found Pan-Atlantic guilty of negligence in that its 'cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel.' However, Ryan created the hazardous condition by its improper stowage of the pulp paper rolls at Georgetown. We think the improper stowage the primary and active cause of the accident. Under our holdings in LaBue v. U.S., 2nd Cir. 188 F. 2d 880, and Rich v. U.S., 2nd Cir. 177 F. 2d 688, indemnity over is recoverable where, as here, the employers' negligence was the 'sole', 'active' or primary' cause of the accident. Nor does the absence of a formal contract bar indemnity. McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E. 2nd 463; Rich v. United States, 2nd Cir. 177 F. 2d 688. Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; accordingly, Pan-Atlantic is entitled to indemnity. There is no need to remand, we direct the judge to enter judgment for Pan-Atlantic against the Ryan Stevedoring Company on the action over."

The Supreme Court of the United States granted certiorari because of the wide application of the case and the conflicting views that had been expressed on the issues by the lower courts.[14] An amicus curiae brief was filed by the United States in support of the shipowner's position and government counsel took part in the argument.[15] The judgment of the Second Circuit was affirmed per curiam by an equally divided court with Mr. Justice Harlan taking no part in the consideration of the case,[16] but the case was restored to the docket for re-argument before the full court,[17] again with Mr. Justice Harlan not participating in the consideration of the petition for rehearing. The case was re-argued before the full bench of the Supreme Court of the United States, and that court, by a 5-4 decision, the opinion for the court being written by Mr. Justice Burton, affirmed the decision of the Second Circuit Court of Appeals.[18] Justices Reed, Frankfurter, Minton and Harlan concurred in the majority opinion. The court first considered the question of whether or not Section 5 of the Longshoremen and Harbor Workers' Compensation Act acts as a bar to the shipowners' asserted right to recover indemnity.[19] The pertinent portions of Section 5 read as follows:

"The liability of an employer...shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."* (Emphasis added).

This question had apparently been raised and argued in both the trial court and the Second Circuit Court of Appeals, but the opinions of those two courts ignored the question entirely.[20]

[12] 211 F.2d 277, 2 Cir. (1954).
[13] 211 F.2d 277, 279 (1954).
[14] 348 U.S. 813, 99 L.Ed. 641, 75 S.Ct. 41 (1954).
[15] 348 U.S. 948, 75 S.Ct. 435 (1954).
[16] 349 U.S. 901, 99 L.Ed. 1239, 75 S.Ct. 575 (1955).
[17] 349 U.S. 926, 99 L.Ed. 1257, 75 S.Ct. 769 (1955).
[18] 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1956).
[19] 44 Stat. 1426, 33 U.S.C. Sec. 905.
[20] 111 F.Supp. 505 (1953); 211 F.2d 277 (1954).

In analyzing Section 5, the majority said that there is no question that this section makes the compensation remedy the exclusive remedy of the "employee" against the "employer". However, the court reasoned that either by formal bond of indeminity or by a contract between the parties, the shipowner would be entitled to full indemnity. The court stated that such a liability springs from an independent contractual right, is not an action on behalf of the employee, and more critically is not one to recover damages "on account of" the employee's "injury or death". The rationale behind the court's holding can best be summarized in these words from the opinion:[21]

> "While the compensation act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor had no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly. See American Stevedores v. Porello, 330 U.S. 446, 91 L.Ed. 1011, 67 Sup. Ct. 847; Crawford v. Pope & Talbot, Inc. (C.A. 3rd Pa.) 206 F. 2nd 784, 792, 793; Brown v. American-Hawaii Steamship Co., (C.A. 3rd Pa.) 211 F. 2nd 16; Rich v. United States (C.A. 2nd N.Y.) 177 F. 2nd 688; U.S. v. Arrow Stevedoring Co. (C.A. 9th Calif.) 175 F. 2nd 325.
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> "The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is granted upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis in not barred by the compensation act."

Having determined that Section 5 of the Longshoremen and Harbor Workers' Compensation Act[22] did not bar the shipowners' indemnity action, the court reached the second question which it viewed as whether, in the absence of an express agreement of indemnity, a stevedoring contractor was obligated to reimburse a ship owner for damage caused it by the contractor's improper stowage of the cargo. The court clearly indicated that the decision would be based on contractual principles and expressly refused to meet the question on common law indemnity principles:[23]

> "Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The court reasoned that Ryan had agreed to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded, that this obligation of necessity encompassed an agreement to stow the cargo properly and safely, and that failure to do so was in effect a violation of the very essence of the stevedoring contract. The court stated that the stevedore owed to the shipowner a *"warranty of workmanlike service"* which the court compared to a manufacturer's warranty of the soundness of its manufacture product. The court rejected the theory that the shipowner's duty to supervise the stowage and right to reject unsafe stowage would preclude it from recovering indemnity in these words:[24]

> "Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's uncorrected failure to stow the rolls 'in a reasonable safe manner'. Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. *Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover*

[21] 350 U.S. 131, 100 L.Ed. 140, 76 S.Ct. 239.
[22] 44 Stat. 1426, 33 U.S.C. Sec. 905.
[23] 350 U.S. 133, 100 L.Ed. 141, 76 S.Ct. 240.
[24] 350 U.S. 134, 100 L.Ed. 142, 76 S.Ct. 240.

and correct petitioner's own breach of contract cannot here excuse that breach." (Emphasis added)

The court clearly indicated that while the vessel may have been unseaworthy and the vessel's officers negligent in failing to discover and correct the improper stowage of the cargo, and that such rendered the vessel liable to the longshoreman, the action would not preclude the recovery of indemnity by the vessel. It is significant to note that all courts considering this case viewed the fault of the vessel as arising from the fact that the vessel *failed to discover and should have known* of the improper stowage. There is nothing in the opinion of any court considering this case to indicate that it was ever urged or proved that the vessel had *actual knowledge* of the condition resulting in injury to the longshoreman.

Mr. Justic Black, joined by three members of the court[25] wrote a dissenting opinion. *The dissenters agreed with the majority that an express contract between the vessel owner and the stevedoring contractor, either oral or written, would have been a valid basis for allowing indemnity.* The dissent concluded, however, that such a contract did not exist under the facts as developed in this case, and that, absent such a contract, Section 5 of the Longshoremen and Harbor Workers Compensation Act[26] precluded a recovery by the vessel owner against the stevedoring contractor. The dissent seemed seriously concerned with the effect of the majority decision on Section 33 of the act[27] which states that if the employee accepts a compensation award, the employer becomes the statutory assignee of the employee's claim. The dissent voiced the fear that the exposure to actions for indemnity created by the majority decision would make the employer, as the statutory assignee, reluctant to pursue any action against the vessel, and thus potentially cut off a longshoreman's right to recover any damages in excess of compensation payments made by the employer as granted in Section 33 (e) (2)[28]. This concern on the part of the dissenters, as might be expected in view of the court's efforts in expanding the rights of longshoremen and its jealous protection of those rights, has proved wholly illusory, and the courts have been quick to permit the longshoremen to pursue a third party action against the vessel, even where his employer has paid compensation under a formal award, if there is any substantial question of a conflict of interest between the employer and the employee.[29]

The initial impact of the *Ryan* decision seemed to indicate the following exposition of principles by the court:

(1) The court specifically left open the question of whether or not indemnity could be recovered on a non-contractual or strictly common law tort theory.

(2) Both the majority of the court and the dissenting justices agreed that the vessel owner can by express contract, either oral or written, idemnify itself against losses incurred in a third party suit, and such an agreement is not violative of Section 5 of the Longshoremen and Harbor Worker's Compensation Act.

(3) The court indicated clearly that the mere fact that the vessel was unseaworthy and that negligence on the part of the vessel's personnel contributed to the injury sustained by the longshoreman was not sufficient to preclude the recovery of indemnity by the vessel against the stevedoring contractor, and that the obligations as between the vessel and the stevedoring contractor were not to be measured by any violation of the duties as between the vessel owner and the injured party.

(4) The court allowed an indemnity based strictly on a contractual theory holding that the stevedoring contractor owes to the vessel a "warranty of workmanlike service" and that the action for indemnity is based on a breach of this contractual arrangment and does not arise "on account of" the employee's "injury or death."

(5) From a factual standpoint, the court held that where the shipowner's only failure was that he did not discover the defective stowage, and the negligence of the stevedoring contractor in stowing the cargo contributed to the injury to the plaintiff, indemnity would be allowed and the stevedoring contractor as a warrantor of its own services could not use the ves-

[25]Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Clark.

[26]44 Stat. 1426, 33 U.S.C. Sec. 905.

[27]33 U.S.C. Sec. 933.

[28]33 U.S.C. Sec. 933.

[29]See *Czaplicki v. SS HOEGH SILVERCLOUD*, 351 U.S. 525, 100 L.Ed. 1387, 76 S.Ct. 946 (1956); *Johnson v. Swordline;* 240 F.2d 954, 3 Cir. (1957); *Johnson v. Swordline, Inc.*, 257 F.2d, 541, 3 Cir. (1958); *D'Amante v. Isthmian Lines*, 159 F. Supp. 468 (1958); *Leonard v. Liberty Mutual Insurance Co.*, 165 F. Supp. 154 (1958).

sel owner's failure to *"discover and correct"* the stevedoring contractor's breach of warranty as a defense.

The Post-Ryan - Pre-Weyerhauser Developments

This phase of the article will discuss the significant decisions subsequent to *Ryan* which cite the *Ryan* case only as authority. The cases will be handled in chronological order leading up to the rendition of the *Weyerhauser* decision by the Supreme Court of the United States. Chronologically speaking, there may be some cases that are subsequent in time to the *Weyerhauser* opinion but, if discussed in this area, they will be discussed solely because the case cites the *Ryan* case only as authority for its holding and discussion of the indemnity question.

Probably the earliest significant decision subsequent to the *Ryan* case is *American President Lines v. Marine Terminals Corporation.*[30]

In this case a hatch beam, which the vessel conceded did not have a locking device, was dislodged by the bridle and hook operated by the winch driver and fell into the lower hold causing injuries to the longshoreman. The winch was being operated in a non-negligent manner. *It was undisputed that it was the duty of the shipowner to repair and maintain the beam locking devices.* The injured longshoreman brought a suit against the vessel. The vessel made no effort to tender the defense of the action to the stevedore. The vessel did not file an action over for indemnity. The plaintiff's case was settled by the vessel. The vessel owner then instituted an action against the stevedoring contractor seeking full indemnity for the amount paid in settlement. In the trial court the shipowner took the position that its negligence was passive, apparently basing this contention on the fact that the evidence showed that the gang foreman knew that the hatch beam was defective when the work began.[31]

The trial court found that the shipowner's negligence was passive and that the stevedoring contractor was negligent in continuing to work with knowledge of the dangerous condition, and that such negligence was active. The court indicated that this would bring the case within the rule permitting common law indemnity on an active versus passive negligence theory as enunciated in *United States v. Rothschild International Stevedoring Company.*[32] However, the trial court *held* the Rothschild approach to the problem had been overturned by the decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation,*[33] where the Supreme Court held that there could be no contribution between joint tort feasors. The court felt bound by that holding and stated that since the vessel owner and the stevedoring contractor were joint tort feasors indemnity would be denied.

The ninth Circuit Court of Appeals *reversed* the trial court. and allowed indemnity, holding that where the shipowner notified the stevedoring contractor that some of the beams were defective and requested that all excess beams be removed, and where the stevedoring contractor had specific knowledge that the beam involved in the accident was defective, that the stevedore had the specific duty to remove the beam, and that the failure to do so constituted a breach of its implied contractual duty to perform its work in a safe and workmanlike manner. The fact that the *stevedore had actual knowledge* of the defect in the beam that was involved in the accident apparently was of considerable significance to the court as is indicated in these words from the opinion:[34]

> "We are not concerned here with a situation in which the stevedores breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence *which is unknown to the stevedore.* Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence or of the ship's unseaworthiness, and in the face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force."

In the writers' opinion, this case effects a substantial expansion of the Ryan doctrine. Clearly in *Ryan* the vessel owner had no actual knowledge of the defects, and its failure was merely one to inspect and discover the defect. Here the fact

[30]234 F.2d 753, 9 Cir. (June 14, 1956); certiorari denied, 352 U.S. 925, 1 L.Ed. 2d 161, 77 S.Ct. 222 (December 3, 1956).

[31]135 F. Supp. 364.

[32]183 F.2d 181, 9 Cir. (June 29, 1950).

[33]342 U.S. 282, 96 L.Ed. 318, 72 S.Ct. 277 (1952).

[34]234 F.2d 759.

that the beam was defective and that the vessel owner had actual knowledge of such defect was never contested at any stage in the litigation. This case indicates that where the stevedore continues operations with knowledge of a defect in equipment supplied by the ship, the stevedore will be held liable for indemnity where its negligent handling of the defective equipment is a proximate cause of the ensuing injury to the plaintiff.

In *Shannon v. United States*,[35] Shannon, a longshoreman employee of M. P. Smith & Sons, Inc., a stevedoring contractor, was injured aboard a vessel owned and operated by the United States. Shannon's injury was occasioned by a defective cable furnished by the vessel to the stevedore to use in the performance of its stevedoring contract. Shannon sued the United States which impleaded the contracting stevedore. During the pendency of the litigation Shannon settled with the United States which thereafter tried the third party suit against the contracting stevedore. The trial court dismissed the government's claim for indemnity, being of the opinion that in order to recover indemnity the government had to show that the stevedoring contractor was actively negligent while the government was passively negligent.[36] The Second Circuit reversed the action of the trial court and held that the United States was entitled to recover indemnity from the contracting stevedore for the amount paid Shannon in settlement.

The Second Circuit held that the contractor's express agreement with the owner to "rig and unrig the ship's gear" encompassed an *implied undertaking* to either remove any known defect in the gear, or to notify the vessel owner of the defect, and that the express undertaking constituted an agreement by the stevedoring contractor to indemnify the owner from any loss resulting from a breach by the contractor. It is significant to note that the appellate court ignored the "active" versus "passive" or common law theory of indemnity that had been relied on by the trial court in reaching its determination, and handled the matter on strictly an *ex contractu* basis.

This case would indicate that even where the shipowner supplies defective equipment to be used by the stevedore and such conduct and equipment is a proximate cause of the ensuing injuries to the plaintiff, the stevedore has a duty to either rectify the defect or to notify the vessel owner of the defect so that corrective measures can be taken. The case, however, does not in the writer's opinion meet what may be a critical question in many factual situations, i.e. the right to indemnity where a stevedore discovers the defect, requests the vessel owner to take corrective action, which request is ignored, and the stevedore continues to work with the defective equipment which ultimately causes injury to the plaintiff.

Probably the most narrow view of the *Ryan* case was announced by the Third Circuit in *Hagans v. Farrell Lines*.[37] In this case a longshoreman was injured when he was struck by a draft of cargo while standing on the pier. The accident was alleged to have been the result of the failure of an automatic brake on the winch to stop the draft of cargo. The plaintiff's complaint alleged negligence and unseaworthiness as against the vessel. Evidence was introduced to show that, just prior to the time the longshoreman began work, the ship's electrician had completed making some repairs to the winch in question. The evidence showed that a ship's officer was standing by, and that after repairs had been made the electrician told the winch operator that it was all right to use the winch. The winch was operated for approximately an hour and a half prior to the accident.

The case was tried before a jury which returned a general verdict in favor of the plaintiff against the vessel owner and against the vessel owner in his third party action against the stevedoring contractor.[38] The jury found in answer to special interrogatories that the winch involved was defective; that the defect was not the sole cause of the accident; that there was concurring negligence on the part of the stevedore's employees; that such concurring negligence was not the sole cause of the accident, and that the plaintiff was not contributorily negligent.[39]

The Third Circuit denied indemnity using the following language:[40]

[35] 235 F.2d 457, 2 Cir. (July 31, 1956).
[36] 119 F. Supp. 706.
[37] 237 F.2d 477, 3 Cir. (July 10, 1956).
[38] 237 F.2d 478.
[39] 237 F.2d 477.
[40] 237 F.2d 482.

"The instant case presents the converse of the Ryan situation. Here, the shipowner, Farrell, was held responsible in the District Court to the injured longshoreman because of a defective winch, i.e. unseaworthiness or a negligent failure to furnish a safe place to work. But the stevedoring contractor, Lavino, had not undertaken to perform Farrell's nondelegable duty, nor did Lavino create the defective condition. To the contrary, Farrell assumed an express obligation running to Lavino to furnish adequate winches in good order, and, as the evidence shows, to maintain and repair them. . . .

"Accordingly, it can only be concluded that Hagans' injury is the result, as the jury found, of Farrell's own conduct, *which at once violated its duty to the longshoreman and to Lavino.* As held in the Ryan decision, supra, the promisor cannot use the promisee's failure to discover and correct the promissor's own breach as a defense. . . .

"Farrell, however, bases its claimed indemnity upon the asserted neglect of Lavino, first, in using the winch knowing its condition to be defective, and second, upon the conduct of the hatchman, Oliver, in signaling the draft out of the hold without making certain Hagans was no longer in its path.

"*Knowledge of and acquiescence in the existence of a defective appliance or condition may prevent the fruition of the right to indemnity...but it does not necessarily follow that the burden to indemnify is thereby created.*

"*Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other.* (citations omitted) Absent the Compensation Act and hypothesizing the legal impossibility of contribution, the independent neglect of Lavino to Hagans would qualify Lavino as a joint tort feasor with Farrel, in which event Farrell could not recover either contribution or indemnity. (citation omitted) But, as we have already stated, Farrell's right to indemnity must arise out of the legal relationship between it and Lavino, and not out of the relationship to the employee. . . .

"Here, Farrell was under a continuing responsibility to Lavino for the good order and maintenance of the winches. It fell down on the job. Indeed, it went further, for its repairman gave Lavino affirmative approval of the equipment in the presence of a Ship's officer. At most, Lavino used the defective winch only a few times in the hour and a half which intervened between the commencement of the use and the accident to Hagans. . .Here, the ground upon which Farrell was held liable to Hagans was its own doing; as between Farrell and Lavino, Farrell had assumed the responsibility. If anything, Lavino only contributed to the happening of the accident. *But if Lavino failed to perform its work properly, we are constrained to hold that, in the face of mutual violations, Farrell is not entitled to full indemnity, and, of course, cannot have contribution.*" (Emphasis added).

A petition for rehearing was denied on September 25, 1956, with two judges dissenting on this basis:[41]

> "It would appear that the decision of this court unduly limits the scope of the decision of the Supreme Court of the United States in Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, 1956, 350 U.S. 124, 76 S. Ct. 232. The decision also seems to us to be in conflict with American President Lines Limited v. Marine Terminals Corporation, 9th Cir., 1956, 236 F. 2d 753. Cf. United States v. Rothschild International Stevedoring Company, 9th Cir., 1950, 183 Fed. 2d, 181. For these reasons we think that the appeal should be reheard before the Court en banc."

Several facets of the *Hagans* case are significant. First, the equipment involved, i.e. the winch, was a piece of equipment that only the ship could repair. Secondly, while the ship's electrician had made some repairs prior to the time that the winch was used by the longshoremen and had told the winch operator that the device was proper for use, there is nothing to indicate that the stevedore made any effort to notify the ship or its officers subsequent to the operation of the winch that it continued to malfunction. In essence *there is no showing that the ship had actual knowledge* that the winch was defective subsequent to the time that the longshoremen began using the winch in the discharging operations. Third, *the stevedore continued discharging operations*

[41] 237 F.2d 483.

with actual knowledge of the defective condition of the winch. The court's view in this case seems to be that where the stevedoring contractor did not "create the defective condition" nor agree to perform the ship's non-delegable duty to furnish a safe place to work to the longshoremen, and the injury results from equipment supplied by the ship, the ship is not entitled to indemnity as against the stevedore on the theory that the failure on the part of the vessel acts not only as a basis for imposing liability in the action by the injured party, but also serves as a breach of the contractual relationship with the stevedoring contractor. This circuit would then hold that negligence in continuing to use defective equipment with full knowledge of the defect, even if a violation of the contractual obligations owed by the stevedoring contractor, would serve only to indicate that there are mutual violations, but would not entitle the vessel owner to indemnity. It is difficult to rationalize this holding with the *Ryan* decision.

It must be remembered that in *Ryan* the ship was guilty of negligence and the vessel was found unseaworthy as a result of an admitted failure on the part of the vessel to furnish adequate chocks for stowing the cargo. The vessel owner had no actual knowledge of the condition of the chocks as mentioned, *supra.* In this case the vessel owner furnished a defective winch, but there is no indication that after repairs were made and the winch was furnished to the stevedoring contractor, that the vessel had any knowledge that subsequent operations indicated that the winch was still defective. The Supreme Court of the United States, subsequent to the *Hagans* case in the *Weyerhauser* decision, stated clearly that the stevedoring contractor's contractual obligations related not alone to the handling of cargo, but also encompassed the use of ship's equipment that was incidental thereto.

It is the view of the writers that the *Hagans* case is in conflict not only with *American President Lines, Ltd. v. Marine Terminals Corporation, supra,* but also clearly in conflict with *United States v. Rothschild International Stevedoring Company,*[42] where the Ninth Circuit, in a factual situation strikingly parallel to that considered by the Third Circuit in the *Hagans* case, allowed indemnity on a tort theory, holding that the stevedore was actively negligent in permitting the plaintiff to continue work when the stevedore had knowledge of a defective winch, and that the passive negligence of the vessel in supplying the defective winch did not preclude the recovery of indemnity. Since the Supreme Court in the *Ryan* case did not pass on the question of a non-contractual right of indemnity, this case still stands as authority for the recovery of indemnity on a non-contractual basis.

Another significant case from the Ninth Circuit which appears inconsistent with that circuit's view in the *U. S. v. Rothschild, supra,* and *American President Lines Ltd., supra,* cases is *United States v. Harrison.*[43] This case involved an action by a longshoreman employed by the stevedoring contractor against the government for injuries sustained when he slipped on an oily deck while unloading cargo from the vessel. It was undisputed that the stevedoring gang foreman had actual knowledge of the condition of the deck which was called to the attention of the vessel owner. Thereafter, the government's agents urged the stevedore to continue operations without stoppage for the convenience of the government. It was further shown that shortly after the accident the government agents had spread sand or sawdust over the oily conditions to remedy the unsafe condition.

The case was tried before the court without a jury and the trial court entered judgment in favor of the plaintiff. *The trial court further made fact findings that the stevedore was not negligent.* There was an express indemnity agreement involved whereby the government was to be held harmless, except where the unseaworthiness of the vessel or a defect in the equipment furnished contributed jointly with negligence on the part of the stevedore in causing the injury, and the stevedore by the exercise of due care could not have discovered the unseaworthiness or defect of the equipment, or through the exercise of due care could not otherwise have avoided such damage, injury or death. The trial court entered judgment in favor of the stevedore and against the vessel denying the indemnity claim.

The government (vessel owner) contended that the stevedoring company was liable by virtue of the express agreement because "through the exercise of due diligence" the stevedore could "otherwise

[42] 183 F.2d 181, 9 Cir. (1950).

[43] 245 F.2d 911, 9 Cir. (April 29, 1957).

have avoided such damage, injury or death". The court disposes of this contention in these words:[44]

> "But it is said that the stevedoring company must be held under the contract, since it, through the exercise of due diligence, could otherwise have avoided such damage or injury. But here the contention is met with other findings of the Court, of which one at least furnished a specific answer. It reads:
>
> > 'It is not true that Jones Stevedoring Company failed to use reasonable care for the prevention of accidents likely to occur for any reason.'
>
> "There should be no method of shifting the burden of patent unseaworthiness, which is the primary and proximate cause of an accident, from the shipowner, whether the owner be a private party or the United States."

A further rationale to the court's holding is evidenced in this quotation:[45]

> "Any attempt to require the Stevedoring Company to hold the Government harmless under the circumstances found in this case, *by stipulations of a contract or otherwise, would be void.* The unseaworthiness of this vessel created a nondelegable duty upon the agents of the Government to render her seaworthy immediately. The defect was not latent, but was patent to everyone who saw the deck. *If the defective conditioning had been concealed and the stevedoring company had been the first to discover it, then a burden might have been placed upon the latter under the contract.* But the duty to keep the ship seaworthy, where the condition are open and notorious to all who look, is not only nondelegable, but continuous upon the shipowner, master and crew."

Narrowly construed this can be viewed as a case where the appellate court is merely saying that the findings of fact by the trial court are not clearly erroneous, and refusing to overturn the decision on that basis. However, the implications of the case may be more far-reaching. The court clearly denies indemnity in this situation where the defect is open and obvious; where both the vessel and the stevedore have actual knowledge of the defect, and the stevedore continues operations at the insistence of the vessel owner. It is difficult to tell just how important a factor in the court's decision was the fact that the government (vessel owner) insisted that the operations continue. However, the court's sweeping statement that there should be no method of shifting the burden of patent unseaworthiness which is the primary and proximate cause of an accident from the shipowner to the stevedore would indicate that the same result might have been reached even if the government had not insisted that operations continue. The court clearly repudiated the idea that the failure of the stevedore to cease operations in this case would make it liable in an action for indemnity. *The majority opinion seemed to make no distinction between the duties owed by the vessel to the injured party, which are unquestionably nondelegable in nature, and the contractual obligations running between the vessel and the stevedore.*

There is a strong dissenting opinion which would allow indemnity, holding that the situation was covered by the express indemnity provision, and that the evidence clearly demonstrated that negligence on the part of the stevedoring company contributed to the accident.[46]

> "It is plain that the accident was in part caused by the stevedoring company's negligence. Its authoritative representatives on board the vessel, namely its walking boss, Eckstein, and its gang boss, Jensen, were fully alive to the fact that oil covered the shelter-deck, thus rendering the area dangerous to the longshore workers. They could and should have stopped the work unless and until the hazardous condition was remedied. Cf. United States v. Arrow Stevedoring Company, 9th Circuit, 175 F. 2d 329, 331. Nor did the failure of the ship to supply sand or sawdust relieve the company of its responsibility in the premises. To the contrary, it had the duty to be diligent in endeavoring to obtain the material from other sources. Metcalfe v. Chiarello, 2nd Circuit, 294 F. 29, 30.
>
> "In sum, the company could have avoided the accident either by stopping the work, or by obtaining material which would render the shelter-deck a

[44] 245 F.2d 916.
[45] 245 F.2d 915-916.
[46] 245 F.2d 917-918.

safe place in which to continue operations. There is no showing whatever that any effort was made in the latter direction other than by asking the ship to obtain the material. Accordingly, the trial court's findings that the injury was not caused in whole or in part by the stevedoring company's negligence are patently erroneous."

It appears clear that the dissenting judge views the stevedore as primarily responsible for the conditions of the premises once it has begun operations, insofar as the obligations running between the vessel and the stevedoring contractor are concerned. Apparently this judge would say that in any situation where the defect was known to, or could have been remedied by, the stevedoring contractor, then the stevedore is obliged to halt operations or remedy the defect under the terms of the express agreement here involved.

A somewhat puzzling view of the indemnity question, in view of the Ninth Circuit's holding in the *American Presidents Line* case, *supra,* is evidenced in that circuit's opinion in *Amerocean Steamship Company v. Copp.*[47] This case involved a claim for damages for an injury to a longshoreman which was settled by the vessel prior to trial and was tried on the indemnity question alone. While the vessel was at sea, a part of the main deck was treated with a rust preventative preparation containing fish oil. It was clearly shown that the slippery condition of the deck was known to both stevedoring personnel and vessel's crew prior to the accident. The stevedore sent the longshoreman out onto the treated portion of the main deck in order to shift a boom, but did not give him any warning of the slippery condition of the deck, and the longshoreman slipped and fractured his hip.

The trial court found:[48]

"That the joint acts of negligence on the part of both claimants and third party respondent *were active, continuous and concurrent to the time of libelant's injury* and proximately caused libelant's injury and claimants and third party respondent were and are joint tort feasors. . . ."

The Ninth Circuit cited the *Ryan* case as authority for the proposition that indemnity would be granted if established on the facts. The court then made this statement, which is somewhat perplexing in view of that circuit's holdings in *American President Lines, Ltd. v. Marine Terminals Corporation, supra,* and *United States v. Rothschild, supra:*[49]

"The doctrine that the stevedore is liable in an indemnity action where the liability of the shipowner is established solely upon the ground of unseaworthiness, while there is a finding of active negligence on the part of the stevedore, has been accepted in many Federal Courts. The best considered decisions, however, limit the theory to a case where it is found on the facts that the duty existed on the stevedore to protect his employees from a highly dangerous appliance or condition, and the breach of such duty was the sole proximate cause of the injury."

In the *Amerocean* case then, the Ninth Circuit denied indemnity on the basis that both the vessel and the stevedore were joint tort feasors, concurrently, continuously, and actively negligent, and that such negligence on the part of both was a proximate cause of the plaintiff's injury.

In the writers' opinion, the holding in this case is questionable for several reasons. First, the only active negligence on the part of the ship was in treating the deck and thus causing the slippery condition. It was undisputed that the stevedoring supervisory personnel had notice of the condition of the deck and failed to warn the injured longshoreman. If the ships actions in this case in merely producing the condition at some time prior to the injury is to be regarded as "active, continuous and concurrent" negligence with that of the stevedore, it would seem that indemnity would be precluded in any case where the condition causing the injury was affirmatively created by the vessel. Secondly, the court's statement that the better reasoned decisions restrict indemnity to situations where a duty exists on the part of the stevedore to protect its employees from a highly dangerous appliance or condition, and the breach of such duty by the stevedore is the sole proximate cause of the injury, seems incon-

[47] 245 F.2d 291, 9 Cir. (March 26, 1957).
[48] 245 F.2d 294.
[49] 245 F.2d 293-294.

sistent with the approach taken by the same circuit in the *American Presidents Line* case, *supra.*

The action of the vessel in this case in failing to correct the slippery condition seems no worse than the action of the vessel in the *American Presidents Line* case in furnishing a beam with a defective locking device. In both cases the stevedore had actual knowledge of the defect, and in both cases the stevedore failed to take adequate precautions to protect its men from the dangers inherent in the situation.

In *Parenzan v. Iino Kaiun Kabushike Kaisya*[50] a longshoreman received in juries while unloading cargo as a result of the collapse of defective dunnage. It was undisputed that after opening the hatch the gang foreman saw dunnage on the cargo, and noting that pieces of the dunnage were broken, warned his men to be careful. The shipowner settled with the injured longshoreman and sued the stevedore for indemnity alleging: First, that the stevedore was negligent in permitting the longshoreman to work in a dangerous area without adequate supervision, and second, that the stevedore breached its implied warranty to perform its work in a competent and safe manner.

The jury found:

(1) That defective dunnage was a cause of the accident to the plaintiff.

(2) That the stevedoring contractor through its hatch foreman knew as the unloading progressed that defective dunnage had been used.

(3) That there were some precautions that the stevedoring contractor could have taken to render the working area safe.

(4)That the stevedoring contractor did not take such precautions.

(5) That the failure to take such precautions by the stevedoring contractor rendered the working area unsafe and was a cause of the accident to the plaintiff.

The stevedore appealed from an adverse judgment on the basis that there was no substantial evidence of notice of the improper stowage; that it was not shown that the stevedore was activily negligent; and that the shipowner was *in pari delicto* with the stevedoring contractor and barred from recovery on that basis. The court held that the notice question was not before the court. In discussing the question of whether or not the stevedore was actively negligent the court said:[51]

> "Secondly, when a person is said to be 'actively negligent' so that he is required to indemnify a joint tort feasor, it means only that he was the primary or principal wrongdoer. *McFall v. Compagnie Maritime Belge,* 1952, 304 N.Y. 314, 107 N.E. 2d 463. In the instant case the appellant's negligence was shown to be active. *With knowledge of the defective condition of the stow, the stevedoring company continued the unloading without taking corrective measures, and its negligence was the proximate and primary cause of the injury to Parenzan. American President Lines v. Marine Terminals Corp.,* 9th Cir., 1956, 234 F. 2d 753" (Emphasis added)

The court disposed of the contention that the vessel owner and the stevedore where *in pari delicto* and viewed the *Ryan* case in this light:[52]

> "Lastly, the ship's owner cannot be said to have been in pari delicto with the appellant. True, it had the duty to see that the stow was proper and this duty was breached. *But the breach of this duty was merely a condition which set the stage for what followed*: In this case, the defendant's negligence in operating with inferior dunnage *American President Lines v. Marine Terminals Corp., supra.* Furthermore, this argument that the shipowner was in pari delicto first saw the light on this appeal. It was not brought forth in the trial of the accident. No evidence was introduced as to the negligence of the ship; the stevedore's defense being solely its own freedom from negligence. Thus, the argument was untimely.
>
> "Moreover, the shipowner's complaint was phrased not only in terms of negligence but also in terms of a breach of warranty. Under the steverdoing contract the third party defendant impliedly warranted to perform the work in a competent and safe manner. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 1956, 350 U.S. 124, 76 Sup. Ct., 232, 100 L.Ed. 133. It is clear that this warranty was breached. That the ship owner failed to discover and correct the

[50]251 F.2d 928, 2 Cir. (February 5, 1958); certiorari denied, 356 U.S. 939, 2 L.Ed. 2d 814, 78 S.Ct. 781 (April 28, 1958).

[51]251 F.2d 930.

[52]251 F.2d 930.

improper stow is no defense. *Ryan Stevedoring Company v. Pan-Atlantic Corp.,* supra." (Emphasis added)

It is interesting to note that this circuit cites the case of *American President Lines v. Marine Terminals Corp., supra,* as authorative. Following the line of thinking of that case, the court seems to indicate that in any situation where the stevedore has actual knowledge of a defective condition which it can remedy, and continues work in such circumstances, without taking corrective measure, the stevedore will be liable in an indemnity action to the vessel owner.

The Weyerhauser Case

The Supreme Court of the United States again considered the indemnity question in *Weyerhauser Steamship Company v. Nacierma Operating Company, Inc.*[53] In this case the court handed down an unanimous opinion. Factually, the case involved a situation where a longshoreman was struck on the head by a piece of wood while working in the lower hold while the vessel was docked in Boston. The parties agreed that the wood must have fallen into the hold from a temporary winch shelter used to protect winch operators from the elements. The evidence indicated that the *winch shelters were customarily erected by the longshoremen* at the beginning of the unloading operations. The shelters consisted of a scrap lumber frame work with a tarpaulin stretched across the top. Because of the flimsy construction, they were considered a hazared at sea, and *were supposed to be removed by the ship's crew when the vessel left port.* The ship's officers admitted that it would be careless to allow winch shelters to remain in place when the vessel went to sea. The evidence indicated that the stevedore built the shelter while the ship was in New York. The court, in its opinion, assumed that the shipowner failed to remove the winch shelter on leaving New York for Boston. There was evidence that the shelter was not inspected by either the stevedore or the ship's crew until the injury which occured some five days after the arrival of the vessel in Boston.

The case was tried to a jury with the judge first submitting the plaintiff's case against the vessel with the statement he was reserving submission of the third party action until he received the verdict on the main suit. The jury was charged as to both unseaworthiness and negligence, and returned a verdict in favor of the plaintiff on the negligence cause of action and in favor of the vessel on the unseaworthiness count.[54] There was some question that the unseaworthiness count was properly submitted by the trial court, but that question was not raised on appeal to the Second Circuit.[55] After receiving the verdict for the plaintiff in the main case, *the trial court directed a verdict in favor of the stevedoring contractor against the vessel on the indemnity action.*

The Court of Appeals for the Second Circuit (the same circuit that allowed indemnity in the *Ryan* case) affirmed the directed verdict. The court indicated that in its opinion a critical factor was that the vessel had offered a ready-made shelter to the longshoreman to use, and thus the vessel could not shift the responsibility for its unsafe condition to the stevedoring contractor:[56]

> "The unsafe condition of the shelter (more specifically the loose board on the top thereof) was the proximate cause of the injury. Assuming a careless erection of the structure by longshoremen in New York, the injury did not occur in New York, but in Boston—and in the meantime the structure was there to be seen on the ship's deck, and the ship had exclusive control over it. The ship negligently departed from established practice in not removing it. It was built to last only as needed in New York, and the New York longshoremen had no reason to anticipate that the structure would be standing when the vessel reached Boston and be offered as a shelter to the longshoremen there. If the New York-built structure had been removed, as all rules of good seamanship dictated, the Boston longshoremen would have erected their own shelter. *Offering a ready-made shelter to Connally, the ship could not shift its nondelegable responsibility for the unsafe condition thereof onto to Connally's employer.*" (Emphasis added)

[53]355 U.S. 563, 2 L.Ed. 2d 491, 78 S.Ct. 438 (March 3, 1958).

[54]236 F.2d 849.
[55]236 F.2d 849, Footnote 1.
[56]236 F.2d 850.

The Second Circuit distinguished the *Ryan* case on the basis of "foreseeability" saying:[57]

"A majority of the Supreme Court held that in agreeing to perform all of the shipowner's stevedoring requirements, the stevedoring contractor agreed to discharge '*foreseeable* damages resulting to the shipowner from the contractor's improper performance of those requirements'. (Italics ours) *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.*, 35 U.S. 124 at p. 129, 76 Sup. Ct. 232, at p. 235, footnote 3, and authorities there cited.

"*It is precisely this fact of foreseeability that differentiates the cases.* In the direct performance of its contractual duty of stowage a stevedoring contractor is obviously chargeable with knowledge that improperly stowed cargo capable of rolling, moving, falling or propelling itself, might do so when the cargo is discharged, and thereby cause someone injury, which injury is directly traceable *without any intervening factors* to the original improper stowage. This is the *Ryan* case. But it is not the instant case. Here, a flimsy shelter built on deck for the convenience of longshoremen at one port which it was negligent for the ship's officers not to have removed before docking at the second port, was permitted to remain in place by the ship's crew and was offered as a safe place to work to a longshoreman at the second port, thereby causing him injury.

"*This independent failure of duty by the ship could not have been reasonably foreseen by the stevedoring contractor. It was a negligent act of the ship alone, not directly traceable to a breach of duty to properly stowed cargo.*" (Emphasis added)

A dissenting opinion in this case held that the indemnity question should have been submitted to the jury under the theory of the *Ryan* case and that the shipowner's negligence, if any, was passive and not active.

The Supreme Court of the United States in an unanimous opinion reversed the Second Circuit and remanded the case for a new trial holding that it was error for the trial court to direct a verdict in favor of the stevedore, and that the issues relating to indemnity should have been submitted to the jury. The court in its opinion indicates clearly that the stevedore's obligations relate not only to the actual handling of cargo, but to the use of any equipment that is incidental to the handling of the cargo:[58]

"We believe that Respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment indidental thereto, such as the winch shelter involved here. *American President Lines, Ltd., v. Marine Terminals Corp.* (CA 9 Cal) 234 F. 2nd 753, 758; *United States v. Arrow Stevedoring Company* (CA 9 Cal) 175 Fed. 2nd 329, 331."

The court goes on to enunciate a principal, without clarification, that may well be the critical factor in indemnity actions:[59]

"If in that regard respondent rendered a substandard performance which lead to foreseeable liability of petitioner (the vessel), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Emphasis added)

The court gave absolutely no indication of just what conduct on the part of the vessel would be necessary to preclude recovery of indemnity against the stevedore, but indicated clearly that the test of liability in the indemnity action rests on different principles than the liability of the vessel to the plaintiff in the main case:[60]

"The evidence bearing on these issues (the indemnity issues)—Petitioner's action in making the shelter on its ship available to respondents' employees in Boston although it apparently was unsafe, as well as respondents continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions. These issues were not encomcompassed by the instructions in the main case, where the test of petitioners' liability was based on failure to perform a non-delegable duty to Connolly, Since

[57] 236 F.2d 851.

[58] 355 U.S. 567, 2 L.Ed. 2d 494, 78 S.Ct. 442.

[59] 355 U.S. 567, 2 L.Ed. 2d 494, 78 S.Ct. 442.

[60] 355 U.S. 567-568, 2 L.Ed. 494-495, 78 S.Ct. 442-443.

the liability of respondent depended on different principles, *Crawford v. Pope & Talbot, Inc.* (CA3 PA) (206 F. 2nd 784, 792) all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case. *Further, the verdict for Connolly did not ipso facto preclude recovery of indemnity by petitioner, for as we have indicated, the duties owing from petitioner to Connolly were not identical with those from petitioner to respondent.* While the jury found petitioner 'guilty of some act of negligence', that ultimate finding might have been predicated, inter alia, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. *Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third party action.*" (Emphasis added).

The court clearly indicates that in its opinion the "active" versus "passive" concepts of negligence are not material to a discussion of the indemnity question on a contractual basis:[61]

> "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Company, supra* (350 U.S. at 132, 133)."

The Supreme Court of the United States indicated that the jury's finding of negligence as against the vessel insofar as the suit by the plaintiff against the vessel is concerned, may have been based, among other reasons, on one of the following:

(1) A failure of the vessel to remove the winch shelter when the ship left New York.

(2) A failure on the part of the vessel to correct or warn the stevedore of latent dangerous condition known to the vessel when the stevedore began unloading operations in Boston.

(3) A failure on the part of the vessel during the five days in Boston to inspect the shelter, detect and correct the unsafe condition.

The court states clearly that *at least* the third reason would not preclude a recovery of indemnity by the vessel, but seems to imply that the vessel might still be able to recover full indemnity even if its failure as regard to the plaintiff was found to be based on reasons (1) or (2). The writers would question the Supreme Court's apparent view that the defect was known to the vessel. A hotly contested point during the trial of the case was whether or not the winch shelters were in fact on the vessel at the time that it arrived in Boston, and there is nothing in the opinion from the Second Circuit that would indicate that the vessel ever had actual knowledge of the defect in the winch shelter.[62]

The *Weyerhauser* case then indicates the following to the writers:

(1) The court expands the *Ryan* doctrine by clearly stating that the stevedore's contractual obligation to stow the cargo in a safe and workmanlike manner relates not only to the handling of the cargo *but to the use of equipment that is incidental thereto.*

(2) The court clearly states that the violation by the vessel owner of a nondelegable duty to furnish a seaworthy vessel and/or a safe place to work for the longshoremen, does not in itself preclude the recovery of indemnity by the vessel; the rights and obligations between the vessel and the stevedore are not to be measured by the duties running from the vessel to the injured party.

(3) The court specifically rejects any application of the concepts of the "active" and "passive" negligence and/or "primary" and "secondary" negligence to the question of indemnity based on the contractual relationship between the parties. However, it should be noted that the court, as it did in the *Ryan*

[61] 355 U.S. 569, 2 L.Ed.2d 495, 78 S.Ct. 443.

[62] 236 F.2d 849-850.

case, leaves open the question of the recovery of indemnity on a noncontractual theory.

(4) The court clearly holds that where the stevedore renders a sub-standard performance which leads to foreseeable liability on the part of the vessel, the vessel would be entitled to indemnity "absent conduct on its part sufficient to preclude recovery". The court, however, gives no indication of what conduct on the part of the vessel would be sufficient to preclude recovery.

The clear statement by the Supreme Court that the stevedore's obligation related not only to the stowage of cargo, but to the use of equipment incidental thereto would seem to cast serious doubt on the Second Circuit's holding in the *Hagans v. Farrell Lines* case, *supra*. There the court placed heavy reliance on the fact that the vessel was responsible for the maintenance of the winches. There seems to be no question that the winches on the ship would be classified as equipment incidental to the loading or discharging operations in any case.

The Post-Weyerhauser Developments

In *Reddick v. McAllister Literage Line*,[63] a longshoreman was injured when he fell from a wooden crate on a ship during unloading operations. The trial court held that the evidence indicated that the ship was unseaworthy and that the longshoreman had not been furnished with a safe place to work because of the defective crate, but allowed indemnity on the basis that the stevedore was negligent in stowing the crates too close together when the correct practice was to leave an open space between crates so that a sling attached to a hoisting device could be fastened around each end of the crates.[64]

The Second Circuit reversed the trial court on the indemnity question and denied indemnity to the vessel on the theory that the injury was caused by the defective crate and that the stevedoring company's breach of warranty in loading the cargo improperly was not a cause of the injury. In discussing the *Ryan* and *Weyerhauser* cases in this connection, the court said:[65]

"However, even if it were properly found that Clark by improper stowage breached its implied warranty of workmanlike service to McAllister, a majority of the Court thinks that there is no showing that this breach caused Reddick's injury. The Ryan case, supra, and the recent case of Weyerhauser Steam-Company v. Nacirema Operating Company, 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 491, indicate that when dealing with contractual indemnity in this type of situation the application of tort theories of liability, i.e., 'active' or 'passive' and 'primary' or 'secondary' negligence is inappropriate *Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on top of the crate was an intervening cause which broke any causal chain that might otherwise have existed.* The only result of improper stowage was to cause a man to walk on top of the crates and use a crow bar to pry them apart. If Reddick had been injured while trying to climb on top of the crates, his injury might have been the foreseeable result of improper stowage and Clark, in that event, would have been liable over to McAllister. But Clark would not necessarily be liable for every conceivable mishap that Reddick might have encountered while on top of the crates. . . . Thus, we conclude that, even assuming proof of Clark's improper stowage, Reddick's injury was due to defects in the crate not foreseeable by Clark and hence not caused by improper stowage." (Emphasis added)

Chief Judge Clark dissented from the opinion denying indemnity.[66]

It is the writers' opinion that this case is difficult to reconcile on the basis of foreseeability. The stevedore's improper stowage forced the man to work on top of the crate. It would seem that practically any type of injury caused by his necessary presence in that location would be sufficiently foreseeable to permit indemnity. The master of the vessel admitted that he could have stopped the stowage of the crates in the manner in which they were stowed; it may be that the court felt that his failure to do so was suffi-

[63] 258 F.2d 297, 2 Cir. (July 14, 1958); certiorari denied, 358 U.S. 908, 3 L.Ed.2d 229, 79 S.Ct. 235, (December 8, 1958).

[64] 158 F.Supp. 326.

[65] 258 F.2d 300-301.

[66] 258 F.2d 302-303.

cient to deny the ship indemnity although the sole rationalization behind the majority opinion is on the basis of foreseeability.

A real landmark decision from the Second Circuit is the case of *Booth Steamship Company v. Meier and Oelhaf Company.*[67] This case involved an indemnity suit by the vessel owner against a contractor hired to repair the vessel's engines. An employee of the repair contractor incurred an injury as a result of a defective wire strap on equipment used by the contractor. The injured man recovered against the vessel on the basis of unseaworthiness. It was agreed by both parties in the indemnity action that *the injuries incurred by the plaintiff were not the result of negligence of either the vessel or the repair contractor.* There was some question who was responsible for supplying and who actually supplied the defective wire strap, but the trial court entered an order dismissing the third party action on the basis that the absence of an express contract of indemnity precluded recovery without proof of some fault, i.e. negligence, on the part of the contractor. It was assumed on appeal in ruling on this question of law that the contractor was in fact responsible for supplying, and did supply, the defective wire strap. Thus, this was an unusual case where the only fault found on either party was the fact that the vessel was unseaworthy. Nevertheless the court clearly indicates that even in such a situation the vessel can secure indemnity on the basis that the warranty of workmanlike service was breached. The court states:[68]

> "The final question is therefore whether on the agreed facts regarding the occurrence of the plaintiff's injury, the implied warranty was breached. The dismissal of the plaintiff's negligence count, and the absence of proof of negligence on the part of Meier (the contractor) establishes that the defect in the strap which proximately caused the injury was latent and not discoverable on visual inspection. *The question therefore is whether a contractor who undertakes to do work aboard a vessel and to supply the equipment essential to the job, and who takes over control of the work to be performed, is liable for the damages incurred by the owner when the contractor's employee is injured because of an unseaworthy condition resulting from the presence of defective equipment which the contractor supplied without fault.* This question was not involved in either the Ryan or Weyerhauser cases, supra, since in each of those cases the non-discovery of the cause of the injury constituted a negligent omission of one of the parties. *But we do not believe that these cases exclude the existence of liability without fault as an element of the warranty of workmanlike service in appropriate cases.*
>
> "Appellant has cited many cases in the federal, state and foreign courts which establish that a supplier of chattels, a bailor or lessor for example, impliedly warrants the suitability of the chattel for the use for which it is supplied. (Citations omitted) In not one of the cases, however, was the injury producing defect one which would not have been disclosed on careful visual inspection . . . . The point of concern in each case appears to have been whether the party suing for indemnity could recover despite his own possibly negligent failure to detect the flaw; and in all it was held that he could so recover. *But in none was the Court required to determine whether an injury produced by a hidden flaw would itself constitute a breach of the implied warranty.* In Hoisting Engine Sales the New York court characterized the supplier's contract duty as at least one of 'reasonable care and skill,' and declined to decide whether the warranty might also be as absolute as warranties in the law of sales.
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> "The implied warranty of suitability for a particular use made by manufacturers and retailers is generally considered absolute, however, and is not avoided by the fact that in the exercise of ordinary care the defendant could not discover the injury-causing defect. See 1 Williston on Sales, Section 237 (Rev. Ed. 1948 and Supp. 1958). It has repeatedly been suggested that the liabilities of suppliers should be co-extensive with those of the law of sales. See 4 Williston on Contracts, Section 1041 (1936 Ed.); 2 Harper and James. The Law of Torts, Section 28.19 (1956); Prosser on Torts 496 (2d Ed. 1955). *In Shamrock Towing Co. v. Fitcher Steel Corp., 2 Cir. 1946, 155 F.2d 69*

[67] 262 F.2d 310, 2 Cir. (December 29, 1958).
[68] 262 F.2d 313-314.

we stated in dictum that the warranty of a supplier of marine equipment was as absolute as the maritime warranty of seaworthiness, see The H. A. Scandrett, 2 Cir., 1937, 87 F.2d 708; that it therefore made no difference whether a defect was discoverable; that as a result both warranties would be breached in the event that the chattel supplied proved inadequate to the purpose for which it was supplied under normal conditions of use. We see no reason to alter that opinion.

.....

"Applying general principles to the facts of this case, we find that the defect which caused the plaintiff's injury was not detectable by the ordinary visual inspection which the vessel's officers on the scene may be expected to make. Such latent defects in wire as are undetectable on visual inspection may result from improper manufacture or from fatigue resulting from use over a period of time. They may perhaps be discovered by subjecting the equipment to appropriate tests with safety factors in excess of the contemplated undertaking. *Furthermore, it is the supplier and not the ship owner who knows the actual history of prior use of the equipment.* He alone is in the position to establish such retirement schedules or periodic retests as will best prevent the development of visually undetectable flaws.

"*Accordingly we hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he supplied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's implied warranty of workmanlike service and rendered him liable to indemnify the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure.*" (Emphasis Added)

The court remanded the case to the trial court to make appropriate findings on whether or not the contractor was responsible for and actually supplied the defective wire strap. This case is significant, of course, because it indicates a liability without fault theory applied to a breach of the implied warranty to perform the services in a workmanlike manner. It seems clear, however, that the court restricts the application of this theory to a situation where the contractor actually supplies and controls his own equipment and a defect in the equipment is the cause of the ensuing injury.

The Crumady Case

On February 24, 1959, the Supreme Court of the United States again rendered a decision in connection with this problem in *Crumady v. Fisser.*[69] The opinion of the court in a 6-3 decision was given by Mr. Justice Douglas with Mr. Justice Harlan writing a dissent for himself, Frankfurter and Whitaker.

The accident occurred while cargo was being removed from cargo hatches by means of the ship's cargo gear. While raising a draft of cargo a topping-lift parted permitting a cargo boom and its attachments to fall into the hatch striking and injuring the plaintiff.

The safe working load of the boom and topping-lift at the time of the accident was three tons. The equipment was in good condition. The winch serving the boom had a device set to shut off the power on the application of a load of six tons which was twice the safe working load for the cargo gear. *The shut off device had been set to operate at six tons by employees of the ship before the winch was turned over to the longshoreman for operation.*

The trial court held the vessel unseaworthy and liable to the injured longshoreman. The trial court further found that the stevedores had shifted the boom in an effort to gain more clearance between the cargo and the sides of the hatch, and that this created a load on the topping-lift greatly in excess of the safe working load. This act the trial court found to be the primary cause of the parting of the topping-lift and the fall of the boom. The stevedoring contractor was found to be negligent in bringing into play the unseaworthy condition of the vessel, and the trial court held the stevedoring contractor liable for indemnity.[70]

The Court of Appeals for the Third Circuit reversed on the basis that the vessel was not unseaworthy and that the sole cause of the injury was the negligence of the stevedoring contractor.[71]

The Supreme Court of the United States

[69] 358 U.S. 423, 73 L.Ed.2d 413, 79 S.Ct. 445 (February 24, 1959).

[70] 142 F.Supp. 389.

[71] 249 F.2d 818.

reversed the Third Circuit and held that the ship owner is not relieved of his duty to supply a seaworthy vessel by turning control of the loading or unloading of the ship over to the stevedore company. The court based its opinion on the fact that the shut off device was adjusted by the ship's crew so as to make unsafe and dangerous for the work at hand.

The court, however, felt that the ship owner was entitled to indemnity under the principle announced in the Ryan and Weyerhauser cases. The court concluded that the negligence of the stevedoring contractor brought the unseaworthiness of the vessel into play and amounted to breach of warranty of workmanlike service.[72]

"A majority of the Court ruled in Ryan Stevedoring Co. v. Pan-Atlantic Corp., 350 U.S. 124, 100 L.Ed. 133, 76 S. Ct. 232, that where a shipowner and a stevedore company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedore company's breach of its warranty of workmanlike service. And see Weyerhauser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563, 2 L.Ed. 2d 491, 78 S.Ct. 438. *The facts here are different from those in the Ryan case, in that this vessel had been chartered by its owners to Ovido Compania Naviera S.A. Panama which company entered into the service agreement with this stevedore company.* The contract, however, mentioned the name of the vessel on which the work was to be done and contained an agreement on the part of the stevedore company 'to faithfully furnish such stevedoring services.'

"We think this case is governed by the principle announced in the Ryan case. *The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not.* That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, Section 133. Moreover, as we said in the Ryan case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' I.D., 350 U.S. at 133,134, See Macpherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. at 1050, L.R.A. 1916 F. 696, Ann. Cas. 1916 see 440, N.C.C.A. 1029.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." (Emphasis Added)

The dissenting opinion states that it would affirm the decision of the court of appeals that the vessel was not unseaworthy. Then passing to the indemnity question, the dissenting justices said that they read the *Ryan* case as holding that the ship is entitled to indemnity only if the liability-inducing unseaworthiness or hazardous working condition had been created by the stevedore. The dissent says that on the court's premises, the stevedore merely brought into play an unseaworthy condition created by the vessel itself. Since it was acknowledged that the condition itself caused the injury the dissenting justices would deny indemnity.

The *Crumady* case seems to hold that the question of who "created" the condition that ultimately leads to the injury is not a critical factor in the determination of the result of an indemnity case. Clearly under the holding of the Supreme Court in this case, a vessel owner may recover indemnity even where some acts on the part of the vessel actually establish the defect that is ultimately involved in the injury to the longshoreman. It appears that the court may by implication in this case be putting forth the theory that the shipowners' negligence has merely set the stage for subsequent acts of negligence on the part of the vessel that actually produced the injury. This is basically the approach taken in the *American Presidents Lines Limited* case, *supra,* and would seem to add some stature to that decision.

The *Crumady* case further makes the first pronouncement by the Supreme Court of the United States that the vessel owner can recover indemnity from the stevedoring contractor even though the vessel owner did not actually hire the stevedoring contractor, on the theory that the vessel is a third party beneficiary of the contractual arrangement.

[72]358 U.S. 427, 3 L.Ed.2d 417-418, 79 S.Ct. 445.

The Post Crumady Era

Two decisions handed down on the same day by the Fourth Circuit highlight the developments since the *Crumady* opinion. In *Calmer Steamship Corp. v. Nacirema Operating Co.*[73] a longshoreman was injured when an unseized cargo light, furnished by the shipowner pursuant to his agreement with the stevedoring contractor, came loose from a cable when it was thrown into the hold by a longshoreman. In response to interrogatories, the trial court jury found that the vessel was negligent in furnishing the light and that the light itself constituted an unseaworthy appliance. The jury further found that the stevedoring contractor was negligent in having used an unseized light and having lowered it into the hatch in an unsafe manner. The indemnity question was submitted to the trial judge with the understanding that the jury's findings would control "as far as they go." The trial court denied indemnity, holding that the vessel was obligated to supply lights which were reasonably safe, that the light supply failed to satisfy this obligation, and that in the words of the *Weyerhauser* opinion, this was "conduct sufficient to preclude recovery."

The Fourth Circuit reversed the trial court and allowed indemnity holding that under the *Crumady* decision, the vessel's conduct under the facts was not sufficient to preclude recovery:[74]

> "Since this decision by the District Court, however, the Supreme Court has adjudicated Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 448, 3 L.Ed 2d 413. While this also does not undertake a definitive statement of the conduct on the part of the shipowner which will bar indemnity, it indicates that furnishing defective equipment will not necessarily have that effect. . . .
>
> "The stevedore attempts to distinguish Crumady, arguing that in that case the shipowners supplied adequate equipment but merely failed to make it safe against the negligence of the stevedore. A similar observation might be made here, for there is no way of knowing whether the cargo light would have come loose if the deckman had not thrown it in the hold roughly. In any event, we do not think that Crumady can be read in that manner for the majority opinion clearly indicates that the equipment provided by the ship was itself considered unsafe and inadequate for the purpose for which it was supplied, and the case was decided on this view of the facts.
>
> "Nor do we think the case is dintinguishable on the ground that here the triers of fact found that the supplying of defective equipment constituted unseaworthiness and negligence, while in Crumady the trier of fact found simply that the defective equipment made the ship unseaworthy but made no specific finding as to negligence. . . . The action over is in contract, and whether the shipowner can recover turns upon whether his actions are such as to bar the enforcement of the contract, and not upon whether he has or has not been found negligent in regard to the longshoreman.
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> "Of little consequence also is it that the actions of the stevedore were found by the District Court to be the primary cause of the accident in Crumady, while the District Court in this case found the actions of the stevedore only a contributing proximate cause. The Supreme Court in Weyerhauser pointed out 'that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate.' 355 U.S. at page 569, 78 S.Ct. at page 442.
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> "In determining whether the actions of Calmar were such as to bar recovery, we must necessarily compare them to those of the owner in Crumady. Here, the ship did not inspect the light and did not provide seizing. In Crumady the ships crew supplied a cut-off device which they had set at twice the rated limit of the rigging. Certainly supplying the defective cut-off device was no less a contractual violation there than the supplying of the unseized cargo light here. If the former did not preclude recovery, then, under the principles announced in Crumady, we think the latter should not."

In accord with this view on the indemnity question, and a case that also states that the question of indemnity is clearly one of federal law is the other Fourth Circuit case, *American Export Lines, Inc. v.*

[73] 266 F.2d 79, 4 Cir. (April 8, 1959).
[74] 266 F.2d 80-81.

Revel.[75] In this case, a longshoreman was injured as a result of a defective winch supplied by the ship. The testimony was clear that the stevedoring contractor had knowledge of the defect through one of the winch operators. It was claimed by the stevedoring contractor, but denied by the vessel, that the ship's officer had been notified of the condition and had advised the longshoremen to continue operating the winch as best they could.

The court indicates that it might have been significant if there had been a trial court finding that the ship's crew had actual knowledge of the defect and consented to the continued use of the winch with knowledge of such defect, but these statements are dicta and the court never really reaches that question,[76] and under the *Crumady* case allows indemnity:[77]

> "We turn to a consideration of the judgments entered in the third party actions. The Supreme Court recently indicated in Crumady v. The Joachim Hendrik Fisser, 358 U.S 423, 79 S.Ct. 445, 3 L.Ed. 2d 413, that by merely supplying defective equipment the shipowner would not necessarily be barred from recovery on its contract of indemnity. We held in Calmar Steamship Corp. v. Nacirema Operating Co., 4th Ct., 266 F.2d 79, that a finding of negligence in supplying such equipment is not determinative of the owner's right to indemnity. His action is in contract and recovery depends upon whether his conduct has been such as to bar enforcement of the contract, and not whether he has been found negligent in regard to the longshoreman. Weyerhauser Steamship Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 78 S.Ct. 438 2 L.Ed. 491.
>
> "We find in this record no basis for a legally signficant distinction from Crumady or from Calmar. The very act of supplying equipment may fairly be considered to be in contemplation of its use, and an assent to such use.
>
> "We do not attempt to explore what conduct, in other circumstances, would be 'sufficient to preclude recovery'. We merely hold that under the decisions of the Supreme Court the limits are not transcended here."

[75]266 F.2d 82, 4 Cir. (April 8, 1959).
[76]266 F.2d 87, footnote 6.
[77]266 F.2d 87.

Conclusion

Certainly, in conclusion of a survey of this sort, covering a rather narrow segment of the law, we should attempt to sum up. We should neatly catalogue in numerical order those salient principles which dictate the correct answers to those questions our clients might ask when faced with problems falling within the purview of this survey. Our first reaction to this problem is a realization that of the thirteen principal cases reviewed herein, no less than eight have, in their short but somewhat checkered careers, suffered reversal at the hands of at least one court, while in six of them one or more dissenting opinions have been written. If such statistics have any value, it is to point out the unsettled state of the law in the field and the dangers of prognostication in this area. However, at the risk of being proved wrong tomorrow (or yesterday), it is submitted that these principles appear to be currently fashionable:

1. All stevedoring contracts include an implied warranty by the stevedore to perform the work in a safe and workmanlike manner. A breach of this implied warranty causing injury to an employee of the stevedore, for which injury the vessel owner is liable, gives rise to an action for indemnity against the stevedore on contractual grounds, and the exclusive liability provisions of the compensation acts are no defense.

2. It is not essential that the stevedore contract to do stevedoring work be between the vessel owner and the stevedore since the vessel owner may be considered a third party beneficiary of the implied warranty arising from the stevedoring contract.

3. The fact that the vessel was unseaworthy and the vessel owner guilty of negligence does not necessarily bar the vessel owner's action for indemnity. The type of conduct which will bar the vessel owner's action for indemnity has not been definitively outlined by any court.

4. The stevedore may incur liability for indemnity without fault in the event the injury was caused by a latent defect in equipment furnished by the stevedore, and brought aboard the vessel to be used in the performance of the stevedoring contract.

In view of the fluid state of the law in this area, two possible courses of action

may be appropriate. First, the contract between the ship owner and stevedore should be in writing and should explicitly cover the rights and obligations of both parties on the indemnity question. Secondly, the ship owner may be well advised to do his own stevedoring work with his own employees. The case of *Bennett v. Mormacteal and Moore-McCormick Lines, Inc.*[78] held that under such circumstances the injured longshoreman was limited to his rights under the applicable compensation act with no right of redress *in rem* against the vessel aboard which he was injured or *in personam* against the vessel owner.

[78]160 F.Supp. 840, aff'd, 254 F.2d 138, (March 13, 1958).

Rights of Employees Under Group Accident and Health Contracts

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EARLY in the history of group insurance the arrangement of the group insurance contract covering employees made by an employer with an insurance company was regarded as a benevolent act by the employer. In *Duval v. Metropolitan Life Insurance Co.*,[1] the court commented on the argument of employee's counsel for impressing agency status on the employer as follows: "That the employer is expected to cooperate with the employees is evident. The whole scheme is paternalistic. The error of counsel, here and elsewhere, is in failing to appreciate that the paternalism is that of employer toward employee. It does not have the effect of making the benevolent parent the agent of the party [the insurance company] with whom he inaugerates a contract for the benefit of his children. The line dividing the three parties to the contract according to their interest and real position in these transacions puts the employer with the employee as opposed to the insurer."

This legal concept of the relationship between the three parties under a group contract has been refined, limited and, in some cases, contradicted by the courts through the years. The group contracts themselves, however, still reflect, to a large extent, this original concept of a benevolent parent (the employer) acting as the master policyholder and, on behalf of his children (the employees), negotiating with and performing administrative functions on behalf of the employees.

All rights the employees obtain under a group insurance contract arise from the group insurance contract. Looking at the contractual relationship of the insurance company to the employees from the point of view of the group contract itself, it becomes apparent from the wording of that contract that, although the employees are the benefit recipients, the terms of the contract regarding coverage costs, type of benefits, benefit limits and eligibility among the employees, are all determined by and between the employer and the insurance company. Inception, termination, increase or decrease in benefits or cost is determined by and between the policyholder and the insurance company, while the very interested parties, the employees, are, according to the contract, bound by the results of these negotiations. Most text writers[2] put the group policy contract under the category of third-party beneficiary contracts, the significant difference being that the benefit payments to the third-party beneficiary, the employees are conditioned upon the payment of premium as consideration. The attempted categorization of a group insurance contract as a third-

[1] *Duval v. Metropolitan Life Insurance Co.*, 136 Atl. 400, (1927), 50 A.L.R. 1276 (1927). This case, involving group life insurance, is considered the classic case in the field of group insurance. The construction of group life policies by the courts will be followed when group disability policies are before them since, with minor differences, notably on use of an incontestable clause and conversion privilege in life but not disability forms, the contractual relationships and duties are identical.

[2] Couch, "Cyclopedia of Insurance Law", 2nd Ed., Vol. 1, Part 1, Ch. 1, Section 1:54, (1959).

party beneficiary contract becomes even more ill-fitting when it is found that most group insurance contracts will allow alteration, amendment and termination of the employee's rights without his consent.[3]

Today's courts are ready to acknowledge the fact that it is not only benevolence that prompts the employer to act as a policyholder for group insurance on his employees. Payments to welfare funds or to insurance plans are recognized as a proper subject to be negotiated between employees and the employer.[4] The employee today has a real voice in the terms of what coverage he is to get under a group accident and health contract or under any other welfare or pension plans his employer may have. His voice is heard, however, at the bargaining table at the time wages and other working conditions are negotiated. The employer, not the insurance company, has to satisfy the employees that the group policy negotiated by the employer with the insurance company is satisfactory and in accord with any understanding reached between this employer and his employees. Once the contract is negotiated, the provisions will specify that employees become eligible for coverage in accordance with its terms and receive the benefits as a matter of right so long as the policy is kept in force by the employer and insurance company.

With this background information in mind, we can assume for the rest of this article that a group insurance contract has been negotiated and issued to an employer covering his employees. What rights now flow to these employees as a result of this group insurance contract?

First of all, the employees will have a right to become insured under the group insurance contract. Again, this right to become insured will depend upon the actual wording of the group insurance contract. The right to obtain coverage is set forth in a provision which defines the classes of employees eligible for coverage, stipulates the requirements for becoming covered, if eligible and describes the benefits, both as to type and limit, which are applicable to each eligible class of employees becoming insured.[5] Commonly, group accident and health insurance contracts make all employees, who have put in a minimum period of employment with the employer, eligible on the effective date of the policy and allow them to enroll for a stipulated period after the effective date without regard to their individual health condition.[6] An employee enrolling after this eligibility period will be accepted subject to evidence of satisfactory health. The requirement of underwriting for employees enrolling after the eligibility period is used by insurance companies to avoid the adverse selection which could occur if employees were allowed to enroll for coverage at any time. As in other insurance forms, the population insured must, as a whole, be up to the predetermined health standard on which the insurance company based its premium rates. The group of eligible employees, as a whole, are satisfac-

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[3]A typical policy provision might read: "MODIFICATION OF POLICY: This policy may be amended or discontinued at any time by written agreement between the [insurance] Company and the Employer." Pickrell, Jesse F. "Group Disability Insurance", (January, 1958), p. 242.

[4]*Inland Steel Co. v. NLRB*, 170 F. 2d 247, (7 Cir., 1948); Retirement and pension plans were held to be within the meaning of "wages" and "conditions of employment" and, therefore, required the employer to bargain collectively with the representative of his employees in respect to such retirement or pension plans; *W. W. Cross Co. v. NLRB*, 174 F. 2d 875, (1 Cir., 1949); Where group insurance was held to be within the meaning of "wages" and "conditions of employment".

[5]The policy provision might read: "ELIGIBLE CLASS OF EMPLOYEES: The eligible class of employees shall include all full time employees *except salesmen*." Pickrell, Jesse F., op cit *supra* Note 3, at 233.

[6]The usual provision with regard to the effective date of individual insurance might read: "EFFECTIVE DATE OF INDIVIDUAL INSURANCE:"

"The insurance of eligible persons for whom written application is made on or before the effective date of this policy shall take effect on said effective date. To the group of persons originally insured shall be added from time to time any new or other persons as follows:

(a) The insurance of persons for whom written application is made before they become eligible shall take effect on the date they become eligible;

(b) The insurance of persons for whom written application is received by the Company within thirty days after they become eligible shall take effect on the date of such application;

(c) The insurance of persons for whom written application is made more than thirty days after they become eligible shall become effective as requested by the Holder on the first day of the first insurance month following the date of acceptance by the Company of such evidence of insurability as it may require.

"If a person to be covered hereunder is absent from active work on account of injury or sickness, when his insurance would otherwise take effect, it shall take effect on the date he returns to active work." Continental Casualty Company, Group Policy Form No. GP 13525, p.b. See also, Pickrell, Jesse F. op cit *supra* Note 3, at 233.

tory to the insurance company for coverage as a group. They remain satisfactory, however, only if those eligible employees becoming insured are representative of the entire eligible group. So long as there is no adverse selection causing a lowering of this health standard of the group insured significantly below the health standard of the group eligible, the insurance company does not concern itself with the health of an individual insured employee.[7]

This right to become insured is absolute as to the eligible employees who satisfy the conditions for eligibility and the enrollment requirements stated in the group insurance contract. The insurance company has no right to refuse insurance to them if these requirements are met.[8]

The employees, once insured, have a right to the benefits, which are payable in accordance with the insurance contract and are limited according to the classification to which the insured employees fall. Usually no choice of benefits is given to the individual employee. He elects to take the benefits offered to his particular class or he does not become covered. In some cases, state statutes specifically preclude a group accident and health plan of insurance which offers the individual insured employee the opportunity to individually select the type or amount of benefits he will obtain under the group policy.[9]

The right to the benefits and the coverage which the benefits represent is by far the most important and substantial right received by the employees. In this respect, however, the legal problems surrounding accident and health benefits and the construction of the various accident and health insuring clauses is the same in group insurance contracts as it is in any other accident and health insurance contract.[10]

In addition to having the right to have the benefits paid to him or at his direction, the insured employee has the right to maintain a suit in his own name for those benefits.[11]

As is usual in accident and health insurance contracts, the payment of benefits is conditioned upon the timely payment of premium for the group insurance policy.

The premium arrangements made between the employer and his employees is one of three types: the employer pays all premium cost (non-contributory); employer and employee share the premium cost (contributory); and the employees pay all premium costs (wholly contributory).[12]

The group insurance policy, however, requires the premium payment not from the insured employees but from the policyholder.[13] If the employer fails to make

[7]Footnote 6, *supra.*

[8]These requirements can and do vary. Again, reference must be made to the controlling provisions of the individual insurance contract.

[9]N.Y. Insurance Law, Book 27, Part 2, Sec. 221, 2(a) (McKinney's Consolidated Laws of N.Y. Ann.) provides: "a policy issued to an employer . . . covering . . . classes [of employees] . . . for amounts of insurance on each person insured based upon some plan which will preclude individual selection." Also see, for further examples, Cal. Insurance Code, Sec. 10270.5 (1957); La. Insurance Code and Miscellaneous Insurance Provisions, Title 22, Sec. 215 (1958); N. C. Insurance Laws, Sec. 58-254.4 (Michie Supp. 1957).

[10]For an excellent, detailed study of group accident and health insurance and the typical types of benefits offered, see Pickrell, Jesse F. *op. cit. supra* Note 3, at 18.

[11]The policy provision might read: "PAYMENT OF CLAIM: Claims made for benefits provided under this policy shall be paid as follows:

(a) Life insurance, if provided hereunder, is payable as set forth in this policy.

(b) All Accidental Death and Dismemberment Insurance indemnities, if provided hereunder, will be paid immediately after receipt of due proof;

(i) indemnity for loss of life is payable to the beneficiary, if surviving the employee; otherwise, to the estate of the insured employee;

(ii) all other indemnities payable to the employee.

(c) Upon request of the employee and subject to due proof, all Accident and Sickness Insurance benefits, if provided hereunder, will be paid each week during any period for which the Company is liable and any balance remaining unpaid at the termination of such period will be paid to the employee immediately after receipt of due proof;

(d) Any other benefits provided under this policy will be paid to the employee immediately after receipt of due proof."

Pickrell, Jesse F. *op cit supra* Note 3, at 241.

[12]Regardless of the method, the employer is sharing some cost insofar as he is maintaining records or making payroll deductions and forwarding premiums to the company even if he does not share in the actual premium dollar cost of the insurance.

[13]The typical provision might read:

"This policy is issued in consideration of the application of the Employer, and of the payment by the Employer of the initial premium due on *June 1, 1957,* which is the effective date of this Policy, and of the payment thereafter by the Employer during the continuance of this Policy of premiums due on *the first day of each succeeding month.*"

"The first anniversary of this Policy shall be *June 1, 1958,* and subsequent policy anniversaries shall be the *first* day of *June* of each year thereafter."

"PREMIUM PAYMENT: Premiums hereunder are payable *monthly* in advance at the Home Office of the Company in Boston, or to a duly autorized agent presenting an official receipt signed by the President or Secretary, and countersigned by

premium payment, the employees' coverage terminates. The Insurance company, upon non-payment of premium by the employer acting as the policyholder, provides in the group insurance contract that it has no further obligation to provide coverage for the employees regardless of the understanding between the employees and the employer as to how long coverage should continue.[14] Ordinarily, the discontinuance of premium payments for a particular employee is due either to voluntary termination of insurance by the employee or termination of employment. Failure to pay premium can also be due to some negligent act by the employer and, where there has been termination of employee's insurance due to employer's negligence, the employer is liable to the employee. Many of the cases coming before the courts involve employees or their beneficiaries who would have received the insurance benefits had the employer properly carried out his administration.

The rationale of holding the employer liable to his employees for negligent handling of group insurance administration absolved the insurance company from liability. This result was particularly distasteful to the courts where the full amount of premium cost had been timely paid to the employer by the employee under a contributory arrangement. The earlier cases were ignored by more and more courts. The employer, while performing premium collection, was held to be acting as agent of the insurance company.

Typifying the modern approach, which ignores all but vestiges of the paternalistic concept of the *Duval* case, is the remarks of the court in *John Hancock Mutual Life Ins. Co. v. Dorman*.[15]

> The insurance provided under the master policy *is handled* for the sake of economy and promptness, under what is known as a simplified accounting system, by virtue of which the . . . [employer] . . . issue[s] the certificates and from time to time make[s] reports in gross to the Home Office of outstanding insurance and premiums collected thereon. (Emphasis supplied [by court])
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> The "handling" of the insurance included the receipt of the employees application, the determination of his insurability as an employee, and of the amount of consideration to be paid by the insured employee . . . and . . . [the issuance of] certificate signed by the insurance company. . . . We find no error in the district court's finding that in this handling process the . . . [employer] was the agent of the [insurance company] . . .

This conflict in the different approaches exemplified by the *Duval* and *Dorman* cases has resulted in a status today where the authorities are not in harmony as to the effect of a cancellation or modification of a policy made by the sole act of the employer and the insurer.[16]

Many insurance companies in their present day group insurance contracts, while not admitting that the employers are agents for premium collection purposes, will provide that an error on the part of the employer in failing to pay premium for an individual employee shall not terminate the individual's insurance.[17]

The certificate of insurance received by the employee as evidence of his coverage under a group insurance policy has been the subject of similar legal conflict and confusion. Today, the group accident and health insurance policies issued by insur-

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[14] See Note 13 *supra*.

[15] *John Hancock Mutual Life Ins. Co. v. Dorman*, (9 Cir., 1939), Rehearing denied 108 F. 2d 220 (1940).

the agent designated thereon. The payment of any premium shall not maintain the insurance under this Policy in force beyond the date when the next premium becomes payable, except as hereinafter provided.

"On request of the Employer, approved by the Company, premium payments may, if not then so payable, be changed on any policy anniversary, so as to be payable annually, semi-annually, quarterly, or monthly; in which event the dates and provisions relating to the payment of premiums will be changed to conform to such modified periods of payment."

Pickrell, Jesse F. *op cit supra* Note 3, at 213 and 239.

[16] *Parks v. Prudential Ins. Co. of America*, 103 F. Supp. 493, (1951).

[17] The usual provision here might read: "Failure on the part of the Employer to record or to report to the Company the insurance of any employee who has fulfilled the requirements for coverage under this policy shall not deprive such an employee of his insurance; nor shall failure on the part of the Employer to record or to report to the Company the termination of the insurance of any employee be construed as a continuation of such insurance beyond the date of termination determined in accordance with the provision entitled 'Discontinuance of Individual Insurance'." Yet, another provision which might be found reads: "EMPLOYER NOT COMPANY'S AGENT: The Employer shall in no event be considered the agent of the Company for any purpose under this Policy." Pickrell, Jesse F. *op cit supra* Note 3, at 239 and 243.

ance companies provide that: "The Company will issue to the Employer for delivery to each insured employee an individual certificate setting forth benefits to which such employee is entitled under this Policy, the name of the beneficiary, if any, designated by the employee, and the rights to which such employee is entitled in case of termination of his employment or termination of this policy or of any Section hereof. Such certificate shall not constitute a part of this Policy." The inclusion of the substance of such a provision is presently a requirement by statute in most states having a group disability insurance law.[18] The original intent of this provision, and apparently of the legislatures enacting the statutes requiring the provision was to provide the employee with a statement of his coverage. While the format of certificates and group policies varies from insurer to insurer, there is seldom any intent expressed in either the certificate or the group policy to make the certificate an integral part of the insurance contract.[19]

The earlier cases followed this intent. The certificate was a beneficence, an extraneous piece of paper. The rights of the employee were to be determined under the group insurance contract itself. The individual certificates were mere recitals of the insurance coverage and were neither separate contracts of or part of the contract of insurance, which consisted of the employer's application and the master policy.[20] This rationale, if followed, would defeat the beneficial interests which many courts felt the employee should receive. The relationship of all parties, including the employee-certificate holder, was more rigorously examined by the later courts and the resultant legal reasoning proceeded along different lines entirely. Any implication of benevolence disappeared. Duty again was present in its place. In 1956, and Illinois appellate court in *Thieme v. Union Labor Life Ins. Co.*, restated this new approach to the certificate's importance in the following analysis:

> The Supreme Court of the United States in the case of *Boseman v. Connecticut General Life Insurance Co.*, held that where a master policy of group insurance stipulated specifically that the law of Pennsylvania was to control the rights of the parties to the contract, a certificate delivered to an insured employee in Texas did not constitute a part of the contract for the purpose of applying the law of Texas to the contract. In line with this decision, three United States district courts have held that a certificate containing no substantive provisions not already embodied in the master policy did not form a part of the insurance contract.[21]

However, in the case of *Parks v. Prudential Ins. Co. of America*,[22] the court in applying the law of Tennessee reached a contrary conclusion[23] and found that the certificate established a definite contractual relationship between the insured and the insurance company despite an agreement between the insurance company and the employer to amend the policy. The facts on which the court reached this conclusion were that the employer and the company eliminated the disability provisions from the master policy and reduced the premium rates payable by the employees. No revision of certificates was made and the question was whether or not the plaintiff was entitled to the disability coverage set forth in his certificate, but eliminated from the master policy. In determining that he was so entitled, the court made two distinct findings: (1) that under Tennessee law the contributions of premium payments by the employee to the employer established a definite contractual relationship between the employee and the insurance

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[18]See Pickrell, Jesse F. *op cit supra* note 3, at 238 for policy containing such provision. For typical state statute requiring inclusion in policy of such provision see N.Y. Insurance Law, Sec. 162 (McKinney's Consolidated Laws of N.Y. Ann.).

[19]A typical provision in the certificate might read: "HEREBY CERTIFIES that the Insured Person and his dependents, if any, for whom the required premium has been paid (herein individually called the Insured Dependent) are insured under and subject to all exceptions, limitations and provisions of said policy for the benefits provided in the insuring clauses hereof." Continental Casualty Company, Chicago, Illinois, Certificate of Insurance form no. GQ 13526.

[20]*Boseman v. Conn. General Life Ins. Co.*, 301 U. S. 196, 81 L. Ed. 1036, 57 S. Ct. 689 (1936) affirming, 84 F. 2d 701 (5 Cir., 1936).

[21]112 Ill. App. 2d 110; 138 N.E. 2d 857 (1956). Also see *Commercial Insurance Co. of Newark v. Burnquist*, D.C.N.D. Iowa (1952), 105 F. Supp. 920; *Walls v. Conn. Gen. Life Ins. Co.*, D.C.D.C. 1949, 82 F. Supp. 421; *Collier v. Metropolitan Life Ins. Co.*, D.C.D.C. 1949, 82 F. Supp. 529.

[22]See Footnote 16 *supra*.

[23]Texas courts too has all but nullified the *Boseman* case theories by distinctions which all but defy the finding of a difference. See *International Brotherhood v. Huval*, 140 Tex. 31, 166 SW. 2d 107 (1942).

company, and (2) that a provision in the master policy for the issuance of a certificate setting forth the protection to which the insured was entitled rendered the protection as set forth in the certificate binding upon the parties. Where the certificate varies in substance from the terms of the master policy, it forms a part of the contract of insurance.[24]

Special attention should be given to the two distinctions relied upon in the *Parks* case that are quoted with such approval in the *Thieme* case. If these two points are rigorously examined, the difference in reasoning from the *Boseman* case becomes more remarkable. These were that: (1) the employee paid part of the premium; and (2) the master policy provided for issuance of certificates describing the employees benefits.

How important is it that the employee paid part of the premium? In the *Parks* case the employee was contributing by payroll deduction to the premium cost. The federal court in the *Parks* case wrestled with this problem briefly and then contented itself with the statement that: "In Tennessee the courts have recognized that one holding a beneficial certificate under a group policy, for which he has paid all or a portion of the premium, has a definite contractual relation with the insurance company . . . and the certificates become integral parts of the insurance contract. The group policy and the certificates are to be construed and enforced together."

As dicta the *Parks* court went further, saying: "The authorities are not in harmony as to the effect of a cancellation or modification of a policy made . . . by the sole act of the employer and the insurer. *In some cases it is considered important that the insurance is non-contributory and furnished gratis to the employees.* Some cases hold that consent of the employee is required and others that mere notice to the employee is sufficient."[25]

[24]See Footnote 15 *supra.*

[25]Where liability has not attached prior to the cancellation, modification, or substitution by mutual agreement between the insurer and the employer or other representative of the group during the term for which it is issued, it may be stated as a general rule that ordinarily such will be held effective as against an insured employee or his beneficiary who has consented thereto.

The courts, however, are not in accord as to whether notice to or consent by the employee or the employee's beneficiary is necessary in order for the insurer and the employer or other representative of the group validly to cancel, modify or substitute the master group policy before the expiration of the term which has been issued, and when neither the insured employee or his beneficiary has consented thereto and no rights affecting the employee or the beneficiary have as yet accrued under the policy. Some courts have held that consent by an insured employee or his beneficiary is necessary before a master group policy during the term for which it has been issued may be, as to that employee or his beneficiary, validly cancelled, modified or substituted before liability has attached, in the absence of a state or provision in the policy to the contrary. This rule has been applied where a policy was non-contributory as well as where it was contributory. In *Hinkler v. Equitable Life Assurance Society,* 22 N.E. 2d 451 (1938), the court concerned itself with two group life policies of which one was non-contributory and the other contributory, both of which were terminable upon termination of employment and for non-payment of premiums but contained a grace clause of 31 days as required by statute. The court held that the cancellation of the policy by mutual agreement between the insurer and the employer several months before the expiration of the current year, to put into effect a new plan of insurance, was ineffective to preclude recovery by the beneficiary of an insured employee who died within the grace period following the cancellation, where neither the employee or the beneficiary consented thereto, although the employee apparently had notice thereof, in which connection the court reasoned that both the employee and his beneficiary had vested interests in the policy, which interest could not be cancelled without their consent, and that whether the contract be called tri-party or contract between two parties for the benefit of a third is immaterial, the court stated that a vested interest was shown by the fact that the employee on severing his connection with the employer had certain option benefits under the policy.

Several courts, on the other hand, have held that a master group policy before the expiration of its term and before liability is attached thereunder as to any insured employee or his beneficiary may validly be cancelled, modified or substituted by mutual agreement between the insurer and the employer or other representative of the group, without the consent of the employee or his beneficiary, so as to effect their rights thereunder. This rule has been applied to cases where the policy was contributory as well as where it was non-contributory. *Austin v. Metropolitan Life Insurance Company,* 142 So. 337 (non-contributory policy); *Kloidt v. Metropolitan Life Insurance Company,* 16 A. 2d 274 (1939) (contributory policy); and *Mason v. Prudential Insurance Company,* 164 S.W. 2d 386 (1942) (involving a contributory master policy containing a provision that by agreement of the insurer and the employer the policy could be cancelled, although that fact was not emphasized by the court).

Stepping further into this area, some courts have taken the position that where the insured employees contributed to the payment of premiums under the master group policy, reasonable notice to an insured employee is necessary in order to deprive him or his beneficiary of rights under the policy before liability has attached as to them, as against the insurer, by reason of cancellation, modification or substitution of the master policy before expiration of the current term by mutual agreement between the insurer and the employer or other representative of the group. *Annotated 142 A.L.R. 1295.*

(Continued on bottom of next page)

The passive language used to describe the significance of the contributory aspect of the premium arrangement between the employer and the employees leaves the definite impression that the terms of this arrangement are not too important to the court.

What then of the point that the master policy called for issuance of certificates to the employees? As previously stated, the present day group insurance contract so provides, in many cases doing so mandatrily under group disability insurance statutes. There is no necessary logical inference in either the provision itself or the statutes of the creation of additional rights to notice or to consent in the employee. To the courts in the *Parks, Dorman* and *Thieme* cases, the issuance of certificates in accordance with a group policy provision carries the implication that the certificates are a part of the contract of insurance. In case of ambiguity or difference the certificate language will control. Where the certificate is a part of the group policy contract, in case of a conflict between them, the terms of the certificate will control as between the employee and the insurer.[26] Further, the requirement of certificate issuance entitles the employee to rely upon the wording of the certificate for his rights, until he has notice, or consents to, a change in those rights.

The full scope of this new legal position of right to notice as to a voice in the modification of group contracts to certificate holders can be appreciated best if the facts of the *Parks* case are examined in detail. The employer held a group policy which provided benefits including a total and permanent disability benefit. The policy also provided for issuance of certificates. The plaintiff employee received such a certificate, which included a recitation of the total and permanent disability benefit. Premium was due from the employer but paid to him by the employees through payroll deductions. The insurer determined in 1947 that it would need a change in the benefits or the rates in order to continue the insurance in force after November 16, 1947. The employer (the police and fire departments of the City of Chattanooga) was notified to this effect early in November of 1947. The insurance company, at the request of the employer, sent representatives to a meeting of employees to explain the proposed changes on November 20, 1947. Notice of this meeting was broadcast by radio to members. The plaintiff never received actual notice and did not attend the meeting. A majority of the members present voted to remove the total and permanent disability provision and take a rate reduction rather than pay an increase for the existing coverage. The employer stated to the insurer that this change was to be effective November 16, 1947. The entire contract was rewritten and executed by both parties May 18, 1948 to be retroactive to November 16, 1947. On May 20, 1948, the plaintiff became totally disabled. No new certificate evidencing these changes was issued to the plaintiff.

Never having received notice of the changes, never having consented to the changes, the plaintiff employee was held to be not bound by the changes in the new contract. The court further discussed the fact that the attempted retroactivity appeared to be invalid also, since the group policy by its terms could only be amended by endorsement thereon by an executive officer. Any attempt to antedate such endorsement even in the endorsement itself was, therefore, invalid.

The fact situation of the *Parks* case is not uncommon in the group insurance field. The insurance company frequently negotiates changes in benefits and premiums with the employer during the life of the group insurance contract. The negotiations together with the mechanics of putting amendments into operation may extend beyond the date such changes are to take effect. To force the insurance company to get consent of all certificate holders and reduce the changes to an executed amendment to the group contract prior to the date the changes are to be effective is an unrealistic if not impossible requirement which completely ignores the practical aspects of group insurance. This concept, if followed, means the insurance company is no longer dealing with one contract and one party, the employer, but is also compelled to negotiate with the employees severally and jointly, exercising rights under a bundle of contracts, their certificates.

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[26] 44 C.J.S. (Insurance), Sec. 299 (b) Note 84, p. 1204; and Note 16 *supra.*

This rule was also applied where the policy was non-contributory in nature in the case *Thompson v. Pacific Mills,* 139 S.E. 619, 55 A.L.R. 1237.

Also see *Poch v. Equitable Life Insurance Society,* 22 A. 2d 590 (1941) and *Butler v. Equitable Life Insurance Society,* 93 S.W. 2d 1019 (1936).

The prime reason favoring the development of group insurance was the reduction in insurance cost to the employees resulting from the savings in expenses of the insurance company. The administration and handling of group insurance is accomplished by the insurance company without the necessity of dealing with insured employees separately. The *Parks* case reasoning, in its zeal to protect the individual employee to the same extent as if he were an individual policyholder, ignores these economic facts.

The conversion privilege[27] is a right given by the group insurance contract, and exists to the extent it is provided for in the contract. While it is a mandatory provision under many group life statutes, only New York requires a provision in group disability policies giving conversion privileges to employees.[28] There were some differences in court constructions on various aspects of this right, notably on the point of coverage on an employee who is terminated under the group policy and suffers a loss before he applies for the conversion policy but during time allowed to exercise the conversion privilege. It was generally held that coverage existed during the term conversion is allowed if the privilege was never exercised. Actual application for conversion within the period of eligibility generally was held to be a condition subsequent.[29] This issue is relative moot in the life field since the modern statutes on group life insurance require that coverage exist during this period. Interestingly enough, the New York law on group disability insurance conversions does not contain this requirement.[30] Whether the same legal interpretations will take place under that statute remains to be seen. What difference in intent, if any, did the New York legislature have in providing in the group life insurance statutes that coverage exists during the period in which the employee can exercise the conversion privilege and omitted this specification in the new group disability statutes? Perhaps, it is because of the fact that the loss occurring within the period for conversion from a group life coverage is caused by death of the employee and, therefore, allows no possibility for later exercise of the privilege by the employee, whereas, the loss occurring within the period for conversion from a group disability coverage does not necessarily preclude later exercise of the privilege by the employee within the time limit specified.

The conversion privilege, if any, will come into play when the coverage under the group insurance plan is terminated as to the individual employee by reason of his ceasing to be in the employee status eligible. This can occur if he changes his job with an employer to one under which he is not eligible for insurance, but usually occurs when he ceases to be an employee of the employer. A group insurance policy containing such a privilege ordinarily provides that an employee's insurance automatically terminates and, upon termination of active employment,[31] may, within

[27]A typical policy provision might read: "CONVERSION PRIVILEGE: Without additional premium charge, it is agreed that when the insurance of the Insured Employee and his Insured Dependents, if any, is terminated by reason of the Insured Employee's leaving the employment of the Employer prior to his sixty-fifth birthday, the Company will issue to such Employee, without evidence of insurability, an individual policy of Hospital and Surgical Benefits at the Company's premium rate in effect at the date of issue, insuring such Employee and his Insured Dependents, if any, provided written application for such individual policy is made to the Company within thirty-one days after the termination of his insurance under this policy." Continental Casualty Company, Insert Page, Form No. G 12094.

[28]New York Senate in its Bill #3648, effective July 1, 1959, and referred to as the "Metcalf Law". Among the many aspects of group insurance treated by this legislation is the provision applying to all group policies providing hospital or surgical insurance except specific disease or accident group policies by which the group policyholder may, at his option, have inserted in any effective group policy a conversion privilege. The option can be exercised by the policyholder either at the issuance or renewal, and unless exercised, the Company need not include a conversion privilege in the policy. It further provides that any covered employee after having been covered for three months or longer under an effective group policy will have the right in accordance with the terms of such conversion privilege to have issued to him a conversion policy upon application thereof without underwriting if such application is submitted within 31 days after termination of insurance. *N. Y. Insurance Law, Section 162-5 (1959).*

[29]*Aetna Life Ins. Co. v. Catchings*, 75 F. 2d 628 (5 Cir., 1935); *Howard v. Aetna Life Ins. Co.*, 329 Ill. App. 248, 67 N.E. 2d 878.

[30]See Footnote 28 *supra.*

[31]A typical provision with respect to discontinuance of individual insurance upon termination of employment might read:

"DISCONTINUANCE OF INDIVIDUAL INSURANCE. The Accident and Sickness Insurance of an employee shall cease automatically on the earliest of the following dates:

(a) the date of termination of employment of the employee, as determined in the immediately succeeding paragraph;

(b) the date of termination of the membership of such employee in the class or classes in-

(Continued on bottom of next page)

a certain period thereafter, apply for and obtain continuous coverage under an individual policy. Such termination of employment under a contract of insurance which provides insurance to individual employees only during their actual employment automatically ends the individual's coverage even though the master policy continues in force. Synonymous, under many policies, with termination of employment is retirement, prolonged leave of absence or lay off. With regard to the leave of absence or temporary lay off, some contracts of insurance provide that the employer may elect to continue the insurance for employees who are temporarily laid off or on a leave of absence. A definite time limit is usually prescribed, and the employer is expected to treat all employees in a uniform manner to prevent adverse selection. No distinction is made in the group insurance contract between voluntary resignation by the employee and discharge. The controlling factor is "cessation of active employment".

Where a large group disability contract is involved, the insurance company will frequently operate on a retention basis. Under this operation, if this retention, together with the losses incurred, is less than the premium received over the policy period, the insurance company will return from the excess an amount of the premium money received as an experience credit. Whether or not the employer paid all or a portion of the premium costs, or the employees paid all or a portion of the premium costs, the refund is always made to the employer. While the amount of experience credit refund can be quite large when a large group is insured, the monies per insured is frequently very small. Practical considerations thus refute the paying back to each insured his pro rata portion of the experience refund. The cost of such distribution would outweigh in many cases the per capita refund. The statutes[32] dealing with the subject recognize this practical problem and so allow the employer to receive the refund with the stipulation that it be applied by the employer for the benefit of the insured employees to the extent that the refund exceeds the employer's premium contributions and administrative costs.

Basically, the intention of these statutes is to prevent unjust enrichment of the employer. Many states have no statute on the subject. There appears to be no cases on the subject, the absence being due largely to the fact that there is probably little abuse by employers in this area. The employers regardless of their share of the contribution, usually use the refund to defray future premiums and, as a practical matter, the refund is often only a portion of the premium contribution made by the employer.

Undoubtedly, the future will reveal some litigation around these experience refunds. A trust concept is definitely implied as to any funds received by the employer in excess of his costs whether a statute exists on the subject or not. It seems that a proper action for an accounting of the disposition of such excess could properly be maintained by an interested employee.

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sured hereunder;

(c) the date of expiration of the maximum number of weeks for which the employee is entitled to weekly benefits;

(d) the date of expiration of the period for which the last required premium contribution, if any, for Accident and Sickness Insurance is made by the employee;

(e) the date of termination of the Accident and Sickness Insurance under this Policy;

(f) the date of termination of this Policy.

The date of termination of employment of an employee shall be the date such employee ceased active work; provided, however, that if such employee ceases active work because of sickness, injury, or temporary layoff, his employment shall be deemed to continue thereafter, for the purposes of insurance hereunder, until terminated by the Employer, acting in accordance with rules which preclude individual selection, either by written notice to the Company or by any other means; provided further, that in the event of temporary layoff, employment shall in no case be deemed to continue beyond the end of the policy month next following the policy month in which the employee ceased active work.

See Pickrell, Jesse F. *op cit supra* Note 3, at 217.

[32]The state of California has by statute provided: "If hereafter any dividend is paid or any premium refunded under any policy of group disability insurance heretofore or hereafter issued, the excess, if any, of the aggregate dividends or premium refunds under such policy offer the aggregate expenditures for insurance under such policy may from funds contributed by the policyholder, or by an employer of such insured persons or by union, or associations which insured persons belong, including expenditures made in connection with the administration of such policy, shall be applied by the policyholder for the benefit of such insured employees generally or their dependents or insured members generally or their dependents. For this purpose of this Section and at the option of the policyholder, 'policy' may include all group life and disability insurance policies of the policyholder." *Section 10270.65, Page 275, California Insurance Code, 1957.*

See also N.Y. Insurance Laws, Sec. 216 (McKinney's Consolidated Laws of N.Y. Ann.).

A recent development legislatively is the increasing number of disclosure laws. The state laws follow in varying degrees the federal law. Disclosure of stewardship by the employer and the insurance company to the individual employees is the paramount purpose. These disclosure laws should accelerate litigation over experience refunds between employers and employees.[33]

[33]*Federal "Welfare and Pension Plans Disclosure Act"*, P.L. 85-836 approved August 28, 1958, effective January 1, 1959. For legislation on state level, see Washington, Rev. Code of Washington, Ch. 48.52, "Employee Welfare Trust Funds", effective June 23, 1955; New York, Art. III-A of the Insurance Law and ART. II-A of the Banking Law, effective September 1, 1956 and amended April 22, 1957; Wisconsin, Ch. 552, Laws of 1957, effective August 22, 1957; Connecticut, Public Act No. 594, General Session 1957; Massachusetts, Ch. 778, Acts and Resolves of 1957; California, Assembly Bill 1773; Ch. 2167, Stats. of 1957; Ch. 8 Pt 2, Div 2, of the Insurance Code; "The Rees-Doyle Health and Welfare Program Supervision Act"; Insurance Code Sections 10640 to 10655.

Automobile Accident Reconstruction Techniques

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WHICH is more dangerous, two vehicles striking each other head-on at 40 miles per hour, or a vehicle hitting a fixed wall head-on at 80 miles per hour? (See Fig. 1).

This question comes up daily in our work of scientifically reconstructing automobile accidents. How many times have you discussed and argued this puzzler with your associates?

This is one of the best examples we know of where lay impressions are insufficient to cope with a problem which is of fundamental simplicity to a trained individual. In fact, and to our amazement, many lawyers think there is no answer to the above question!

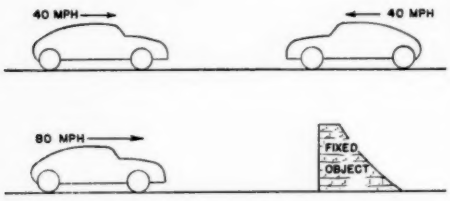

Fig. 1—Which of the two situations will do the more damage to the vehicle on the left?

Naturally, before we attempt to present an understandable solution, we must build up a minimal background in the concepts involved. But first, let us discuss the impact of expert testimony in the courts of today.

The growing acceptability of scientific expert testimony in many of the country's progressive courts has resulted in new and powerful methods of presenting evidence. The method of scientific deduction and proof is powerful because it offers an unassailable line of defense or prosecution in many cases. It is practically impossible for even the most gifted lawyer to refute a basic law of science by even the most clever cross-examination. Wellman, in "The Art of Cross-Examination" states:

> "As a general thing, it is unwise for the cross examiner to attempt to cope with a specialist in his own field of inquiry. Lengthy cross-examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted."

Given a certain set of facts a scientist can reach a conclusion which, in some cases, can fix the blame for a wrongdoing, thus saving court time and expense and resulting in a full measure of justice for the offended.

Although science has been used in a countless variety of circumstances, such as slip and fall, electrical problems, bottle failures, sample identification, and others, perhaps the widest use of scientific analysis is in motor vehicle accident reconstruction.

A motor vehicle accident represents a situation which must follow many principles of statics and dynamics, two facets of the broader physical field of mechanics. Any object which moves in any fashion, be it a simple ball or a giant airliner, must respect these fundamental precepts by which our universe operates.

Even though what we have just men-

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He has appeared as an expert witness in major trials in over a dozen states and Canada and is author of numerous articles on the use of science in our courts.

A physicist by training, he has taught at the University level for 15 years, headed research projects for industry and the government, and devoted a great deal of time in obtaining original data of vital interest to the legal profession.

He has testified on impact angles, tire-marks, tire failures, whiplash, fixed-object impacts, intersection collisions, pedestrian accidents, and many other accident causes.

Professor Karas is a member of the Highway Research Board, American Physical Society, American Association for the Advancement of Science, and ten other scientific societies.

tioned is untuitively obvious, it is surprising to find some counsel and courts still apparently mystified to learn that these same principles do apply to a modern automobile, irrespective of its controlled or uncontrolled behavior.

It is the purpose of this paper to pursue, necessarily in a limited fashion, the application of energy principles to motor vehicle accidents.

Energy, in its simplest sense, is the ability to do work. The energy may be in forms such as electrical, thermal, magnetic, mechanical, and others.

In the evaluation of a vehicle accident, we are interested primarily in mechanical energy.

Two fundamental classes of mechanical energy are of interest in this instance, potential and kinetic. Energy considerations will also be required when a car skids to a stop due to friction between tires and road surface.

Potential energy is energy available to do work because of the relative positions of an object. The simplest example would be the case of a car on top of a hill which can do work by rolling down this hill. One can easily see the application to motor vehicle accidents here, since many collisions occur on the way up or down an incline. In fact, the source of a vehicle's energy at impact may well be supplied mainly by the action of rolling down a hill.

To determine the potential energy exchange in such a case, one needs to know the vertical height through which the vehicle moved, and its weight. Phrasing this in a converse fashion yields the result that a vehicle which moves from one place to another on a level road undergoes no change in potential energy. In fact, we can go one step further, and say that although a vehicle may go up and down numerous hills in reaching a destination, there is no net change in its potential energy unless it ends up at a different level than that from which it started.

Using potential energy considerations alone it is possible for a physicist to determine the maximum speed a vehicle would attain in rolling down a certain incline!

Kinetic energy, as the name implies, is energy due to motion. Everything that moves possesses kinetic energy, be it a supersonic bullet or a sluggish earth-moving tractor. Certain dependencies are known to exist.

The faster an object moves the greater its kinetic energy.

For a given velocity the kinetic energy of a vehicle depends upon its mass (which can be determined from its weight).

These dependencies must be investigated further. The equation for kinetic energy shows that if you double the mass of an object moving at a certain velocity, you double its kinetic energy. In scientific terminology, one says that kinetic energy is directly proportional to mass.

The dependency of kinetic energy on velocity is more complex. If you double the velocity of a moving object, you do not double its kinetic energy, you quadruple it! (See Fig. 2). If you triple the velocity,

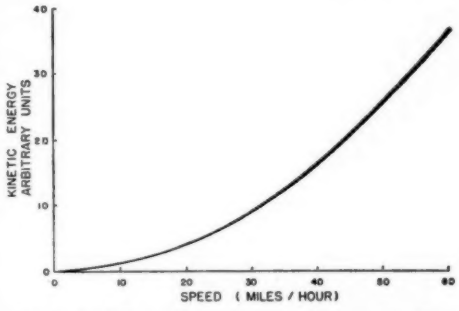

Fig. 2—Variation of kinetic energy with speed. Note that doubling the speed quadruples the energy, i.e., the relation is not linear.

the kinetic energy increases by a factor of nine.

Pursue this far enough and you will reach the conclusion that the kinetic energy of an object is directly proportional to the square of its velocity.

As an example, this means that a vehicle going 20 miles per hour has four times the kinetic energy of the same vehicle at 10 miles per hour; going 30 miles per hour the kinetic energy becomes nine times as great; and stepping up the velocity to 40 miles per hour increases the kinetic energy by a factor of 16!

Of course, kinetic energy in itself is not harmful. But convert this energy into destroying sheet metal and other components in a collision and you can see why high speeds are dangerous.

It is unfortunate that many laymen do not realize that this relation of speed to energy of destruction exists. Most drivers think that doubling the speed doubles the

kinetic energy. How untrue and how hazardous!

You may well ask where this kinetic energy "goes" during an accident, i. e., into what is it transformed? It is used to deform sheet metal, twist the frame, move the engine, batter the occupants, destroy the surroundings, and the other manifestations of force which appear at the scene of a mishap.

If the driver has sufficient time to act before an accident occurs, and slams on his brakes, then some of the kinetic energy is dissipated in heating the tires and roadway as he skids in an attempt to avoid the danger. If he is lucky, he uses all the kinetic energy in this fashion, i. e., he skids to a stop before the collision.

At this point you may well ask, of what use are these abstract concepts to the practicing attorney? What, of significance, can be developed which is of use in a trial?

The development or calculation of speed from tire marks is just one of the recurring items. If the car comes to rest, we can reach sensible estimates of speed at brake application. If the vehicle does not stop, but impacts another object, we can still determine useful information about inital speed by assuming impact velocities and working in reverse.

Naturally, we always have a good chance of using witness' testimony for original data from which to proceed, or, conversely, may be able to show errors in witness' testimony by indicating conflict with universally accepted laws.

Perhaps some actual case histories will help show the advantages of scientific reconstruction.

We were able to reach an acceptable conclusion as to the speed of a vehicle which struck a pedestrian.

We were able to show, using the testimony of witnesses, that by using their own observations and estimated figures a known collision would never have occurred!

The possibilities are virtually endless. Yet very few days pass during which one or more attorneys are not startled by the advantages of scientific reconstruction. Apparently new ideas are accepted slowly in the legal profession. Scientifically, legal circles are barely getting off the ground while the rest of the world is at the edge of space.

Now that we have defined some of our terms, let us proceed to an analysis of the two-car head-on impact versus the fixed barrier impact problem. Which is more dangerous, two vehicles striking each other head-on at 40 miles per hour, or a vehicle hitting a fixed wall head-on at 80 miles per hour?

Let us assume that all vehicles have the same weight, and hence the same mass. Immediately we know that their kinetic energies depend only on the square of their velocities.

Now, what causes the vehicles to be destroyed? The answer is the dissipation of the energy acquired by their motion when they are suddenly stopped by striking an object.

To simplify matters, we will set up as "unit energy" that available to one of the vehicles going 40 miles per hour.

Then each car involved in the first situation, i. e., head-on impact of two vehicles, has one unit of energy. The total energy available for dissipation is two units.

Now, it can be shown that in such a collision the energies are dissipated equally between the two vehicles, assuming identical reactions of both. Hence, the destruction wreaked on each vehicle is that due to the dissipation of one unit of energy.

The other vehicle in the hypothetical case hits a fixed barrier, or wall, at 80 miles per hour. Now, if we are not versed in the dependence of kinetic energy upon velocity, we might make the critical error of assuming that the kinetic energy available is just two units, since the velocity is double.

This is not so.

Doubling the velocity quadruples the energy. Thus, the vehicle has four units of energy to dissipate! This, needless to say, is much more devastating to this vehicle than the energies available to the car in the previous case.

Thus there is no doubt that hitting a fixed barrier at 80 miles per hour is much more dangerous than a head-on collision between two similar vehicles each travelling 40 miles per hour!

Our puzzler is solved!

Now that the method is clearer, you can deduce that the destructive effect would be the same if the fixed barrier impact occurred at 40 miles per hour. Then you have one unit of energy and one car to absorb it, and the destructive effects are matched. This, of course, assumes that the wall does not move nor disintegrate.

By this time it is apparent that there is a great advantage to a scientific analysis of a motor vehicle accident.

The analysis can show one of three things. Either that the impressions of the counsel are correct, or they are not, or that he does not have sufficient information to reach either conclusion above.

To us it appears extremely important that counsel realizes which of the three former situations apply to him.

If he is correct, then he should proceed with full vigor.

If incorrect, he should settle or abandon the case.

If he has not enough information, then he needs to obtain it — or at least feel secure that opposition counsel cannot prove anything further without additional information.

Lawyers always like to know how they stand, for to them time is of vital importance. To learn, after months of preparation, that facts are in conflict, or that it is scientifically obvious that a lawyer is pursuing a losing battle, is irritating to say the least.

Thus, to an attorney who has respect for his time and efforts, the best advice is to obtain scientific aid at the outset, even before he commits himself to take the case.

The well-known axiom that "an attorney should never ask a question if he does not know the answer ahead of time" should be modified to "an attorney should never start asking questions unless he knows he is on the winning side ahead of time".

Bankers Blanket Bonds: What They Cover and What They Do Not*

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YOU will observe that this paper is supposed to include some remarks on what is not to be covered under Blanket Bonds in favor of banks as well as losses which are to be covered. It is not too difficult to determine what the drafters and underwriters of such bonds intended, but since now and then courts and judges are required to pass upon the language and to say what was intended, we must admit the possibility that losses may be covered which were not thought to be covered. We will delve into a few instances as we go along.

A Bankers Blanket Bond is a four-page—or longer—printed document executed by an insurance company with charter and statutory authority to write bonds and is in favor of a commercial or a savings bank. In its beginning or obligatory paragraph it says that in consideration of a premium, the insurance company will pay and make good, or indemnify and hold harmless such bank against, all such losses as it shall sustain or discover during the period of such bond, the losses to be sustained in the manner or as a result of the hazards set forth in the policy.

Such bonds cover losses resulting from various hazards which are set forth in separate insuring clauses. The first, and perhaps the most important, are losses resulting from any dishonest, fraudulent or criminal act of officers, employees, and attorneys and their employees, the latter while performing legal services for the bank.

As a rule, not too much difficulty is encountered in deciding whether any particular loss was caused by acts of employees which were dishonest, fraudulent or criminal in nature. Most cases involve the outright embezzlement of money or other property, but now and then losses are discovered and serious questions exist as to whether the acts causing them were dishonest acts.

*From a speech prepared by Ernest W. Fields for delivery before the Banking Law Section of the New York State Bar Association at Rochester, New York, October 9, 1959.

MR. FIELDS, *who is Vice-President of Federal Insurance Company is a graduate of Lincoln Memorial University, and received his LL.B. from New York University. A recognized expert in the fields of fidelity and surety law, he has served on many committees of the International Association of Insurance Counsel, and was a member of its Executive Committee in 1948-51.*

Three important words in this insuring paragraph are the words "dishonest", "fraudulent" and "criminal". Dishonesty is not a term of art. It has not a statutory definition. It is not defined in Bouvior's Law Dictionary, and Black's Law Dictionary defines it as "untrustworthiness, lack of integrity". A standard dictionary says:

> "The quality of being dishonest, fraud or violation of trust".

Perhaps Judge Cardozo came close to a proper interpretation of the word when used in a Bankers Blanket Bond in his opinion in the *World Exchange Bank* case,[1] in which case he had before him a situation where a teller in the plaintiff bank had permitted a depositor to draw checks against uncollected funds and had paid such checks when presented. The items creating the balance were not paid when presented, thereby causing a large overdraft. The teller was required by the bank's rules to secure the approval of a senior officer before permitting such practice, but he failed to secure such approval. He believed the deposited items to be good and, while he acted in good faith, his failure to follow the bank's rules caused a substantial loss.

[1] *World Exchange Bank v. Commercial Casualty Insurance Company*, 255 N.Y. 1, decided November 1930.

The plaintiff bank sued under the Bankers Blanket Bond claiming that these acts of the teller were dishonest acts within the meaning of the policy.

Judge Cardozo said:

> "The appeal is to the mores rather than to the statute. Dishonesty, unlike embezzlement or larceny, is not a term of art. Even so, the measure of its meaning is not a standard of perfection, but an infirmity of purpose so opprobrious or furtive as to be fairly characterized as dishonest in the common speech of man. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract."

The court held that there was an absence of a wrongful motive and held that such loss was not one covered by the section of the bond perfecting against dishonest acts of employees.

Of a similar import was the decision of the Court of Appeals of New York when, in 1926, that court held that a cashier's act in permitting a customer to draw against uncollected funds was not necessarily dishonest and that a wrongful motive must be shown.[2]

Perhaps the latest important case on the subject is a case decided in 1955 by the Supreme Court of New Jersey.[3] The facts were that the defendant surety company had written its Bankers Blanket Bond in favor of the plaintiff mortgage corporation against "any loss through any dishonest, fraudulent or criminal act of any of the employees". A substantial portion of plaintiff's business was lending construction funds to contractors to build homes and its practice was to advance these funds to the contractors as the houses were in various states of completion; for instance, 20% when the slab was completed, an additional 15% when the building was roughed in, another 20% when the building was enclosed, and so on.

The plaintiff had in its employ a building inspector whose duties were to inspect these houses and to certify to the bank their state of completion in order that the bank could advance the funds as required. For a period of time this employee personally and faithfully made these inspections and certifications. However, over a period of four months he made 92 certifications to the bank with respect to the construction status involving 35 houses and in reliance upon these certifications, the bank advanced substantial construction funds to the contractor. The contractor defaulted on his loan obligations and the bank sustained a substantial loss. It was then determined that these 92 certifications by the bank's employee were incorrect and that such employee, instead of personally inspecting the 35 houses, had accepted the word of the contractor's superintendent as to their percentage of progress, and that, instead of the houses being completed to such extent, their completion status was very substantially less.

The bank filed suit against the surety company claiming that the employee's acts in failing to personally inspect the buildings and in certifying to his employer that he had personally inspected them and that they were of a certain completion status was a dishonest act within the meaning of the bond.

The case was first tried in the Law Division of the Superior Court of New Jersey before a jury. At the end of the trial the court denied the plaintiff's motion for directed verdict and submitted it to the jury which returned a 10 to 2 verdict of no cause of action, meaning that in the jury's opinion the employee was not dishonest. Thereupon, the trial judge, while denying the plaintiff's motion for a judgment non obstante veredicto, granted an alternative motion for a new trial, giving it as his opinion that the employee was guilty of a series of dishonest acts.

The case was tried again before a jury and again at the conclusion of the trial the trial judge denied plaintiff's motion for directed verdict and submitted it to the jury and the jury was told to determine whether the employee's acts were "either dishonest or fraudulent". The court instructed the jury that such words meant bad faith, a breach of honesty, one of integrity or moral turpitude. The trial judge told the jury that they should take into consideration in determining whether the employee was dishonest the question of whether the acts of the employee were reckless, wilful and a wanton disregard for the interest of his employer and whether his acts were manifestly unfair to the employer and palpably submitted the employer to the likelihood of a loss.

[2] *The First National Bank of Edgewater, N. J. v. National Surety Company*, 243 N.Y. 34.

[3] *Mortgage Corporation of N.J. v. Aetna Casualty & Surety Co.*, 115 A.2d 43.

Again the jury returned a verdict of no cause of action and again the court set aside the judgment for the defendant and, upon the motion of the plaintiff, directed a judgment for the plaintiff for 88,000-odd dollars in keeping with the court's view; that an intent to harm his employer or intent to profit from his acts was not an essential ingredient of the act to bring it within the category of dishonesty.

The court's view in directing a verdict for the plaintiff was that the acts of the employee in failing to personally inspect these buildings and in accepting the word of another, though that other was the general superintendent on the project and was a man in whose integrity the bank's employee firmly believed, and in certifying to his employer status of the completion of the buildings when he had no direct knowledge that they were of such completion status, was of such a nature that he was unfaithful to his employer, that he lacked integrity and that it brings him squarely within the definition of dishonesty.

At this state of the case the defendant surety appealed to the Supreme Court of New Jersey.

The Supreme Court of New Jersey, in a 4 to 3 decision, sustained the judgment below. The majority, after stating that such bonds are to be broadenly construed, adopted the view that "dishonest, fraudllent or criminal" acts of employees as used in such bonds evidenced the clear intent to protect the employer against employees' wrongful acts which, though not criminal, nevertheless display significant lack of probity, integrity or trustworthiness. The Court said:

> "The absence of any motive of personal profit or gain does not establish that the wrongful act of the employee was not dishonest."

While the majority agreed that mere neglect or incompetence, mistake or error in judgement were not acts within the meaning of the word dishonesty, the court did feel that these acts of this employee were of such a nature that they amounted to dishonest acts within the meaning of such policy.

In a forceful dissenting opinion the minority disagreed. They felt that this employee, who was something more than 65 years of age, and who had had considerable experience in the construction field, had acted in good faith; that a number of circumstances had contributed to his failure to personally inspect these 35 houses, among which was a rather violent storm, a burden of manifold duties because he had many similar projects under his supervision. He also was out soliciting new business. Many days he would work in his home until midnight preparing his reports. He was required to inspect and certify a tornado damage to many houses involving as many as 100 claims. He had calls to make in relation to delinquent mortgages and the like.

The minority felt that the use of the words "dishonest, fradulent or criminal act" were designed to express as well as to delimit the contractual indemnity and that these words plainly exclude liability for loss by negligence, no matter how gross. They felt there must be a wilful and intentional design to practice fraud or to work injury upon the indemnitees, that reckless, indifferent, careless or wanton acts were not intended to be dishonest acts.

A fraudulent act as intended in such policy is an act that involves wilful intent to defraud. A criminal act, of course, is an act that violates a statute.

The second insuring clause of Bankers Blanket Bonds is commonly called the property clause. This insuring clause is the loss of property such as money, jewelry, precious metals, securities such as stock certificates, checks, money orders and the like, which are lost either from the premises of the bank or when in transit outside of the bank through the hazards of robbery, burglary, holdup, larceny, theft, false pretenses or mysterious disappearance.

This insuring paragraph is in two parts: The first is the loss of the property while such property is lodged or deposited within any offices or premises located anywhere, except while in the mail or with a carrier for hire other than an armored motor vehicle company.

Losses under this section of insuring paragraph 2 are generally the holdup cases, the breaking and entering of night depository vaults and the like, the losses of such property through larceny, theft or false pretenses which cover the cases of cashing checks drawn on other banks where there are no funds on deposit at such other bank, or cashing of checks payable to a corporation for an employee of such corporation who has no authority to endorse the checks, and similar cases.

The loss of property through false pretenses is, of course, something less than larceny. Larceny generally involves the taking of property without the consent of the owner. On the other hand, a voluntary delivery of property can be made and false pretenses cover the delivery of that property even though voluntary.

Perhaps the most difficult, and currently the field of losses about which most uncertainty exists as to coverage, is the so-called "check kiting" case.

The usual check kiting situation is generally this. The same individual opens an account in two different banks, the banks generally located some distance apart, so that 3, 4 and 5 days are required for checks to clear between them. In bank A he deposits his own check to his own credit drawn on his account in Bank B. In bank B he deposits his own check to his own account drawn on bank A. He then draws checks in payment of obligations or to run his business on both banks and each bank allows him to draw such checks and pays them from the balance created by uncollected funds. What happens is that, through one medium or another, one or other of the two banks either gets suspicious or decides not to continue the practice of paying checks against uncollected funds, and one of the banks then returns the checks drawn on it and accepted by the other bank, and the kite is then exposed and a substantial overdraft exists in both banks.

Recently an individual, whose business was that of buying and selling real estate, approached a midwestern bank for an $8,000 loan. The bank looked into his financial condition and refused the loan. The individual then went approximately 100 miles to another bank in a second state, opened an account in his own name with a deposit of $100. He then deposited in the bank which had rejected his application for a loan his own check for $8,500 drawn on the bank in the other state where he had just opened the account. The bank credited his account with the $8,500 and forwarded the check to the other bank for collection. In the meantime, the depositor drew his check on the first bank for $8,000, paying a gambling debt. Notwithstanding the fact that five days earlier that bank had rejected an $8,000 loan, it had no hesitancy in paying the $8,000 check when presented, although the check creating that balance had not yet been accepted by the bank on which it was drawn. Of course, the bank in the distant city returned the check. In the meantime this individual had also deposited checks in the second bank drawn on the first bank, but the second bank had refused payment until the checks were collected.

Of course, the result of this was that the individual got free credit extended by the banks at no interest whatsoever.

The practice of permitting depositors to draw against uncollected funds has unfortunately been increasing in recent years. Competition between banks for deposits, the desire to extend service to customers, the battle for larger deposits and the large volume of clearing items, the turnover in banking help, and such things, have been contributing causes.

In some cases, permitting depositors to draw against uncollected funds has been deliberately countenanced by executive officers and the bank has been aware of such practice, but has permitted it believing the depositor to be honest and, most of all, solvent. In other cases, of course, the practice is not known and would not be tolerated if disclosed.

Generally, the funds created by the credit are withdrawn in a normal manner by the depositor drawing checks to the order of his vendors or creditors and the check is received from other banks or through the clearing house and it is rare that checks drawn on this created balance are cashed on the premises of the bank.

When such a loss is discovered, two serious questions arise as to the possibility of coverage under the property section of the Bankers Blanket Bond. The first question is whether any loss through larceny or false pretenses occurred on the premises of the bank. Since the bank paid the check drawn upon it to another bank or to some other depositor or through the clearing house, that payment was made to some individual or corporation other than the depositor who, of course, had no dishonest intent, and who, in presenting the check, was not guilty of any false pretense, not being aware of how the balance was created.

The second question, which has arisen in such cases, is whether or not in permitting a depositor to draw against uncollected funds, meaning a balance created by the deposit of his own check drawn on another bank, the bank in permitting such practice is not in effect extending credit

to the depositor just exactly to the same extent as though he makes a loan. The bank is aware that it is depositor's own check drawn upon his account in another bank that is creating the balance, and therefore in paying out that balance it is in effect extending credit to the depositor until such time as the check is paid by the bank upon which it is drawn.

This situation, involving a loss to two banks, which occurred in a typical check kiting situation, finally reached the courts in 1952 and for two years was extensively litigated.

The first case was *F.D.I.C. v. Hartford.*[4] Its counterpart, the second bank which had a loss out of the kite, was *Bank of Altenburg v. Fidelity & Casualty Company.*[5]

A trucking company in the little town of Brazeau, Missouri, had an account with the Brazeau Bank and also an account in the Bank of Altenburg, five miles distant. Checks between these two banks were cleared, however, through St. Louis, Missouri, and required four days to clear. This trucking company deposited its own checks in each of the two banks and was permitted to draw checks against the balances so created, which practice continued over a period of time until finally one of the banks refused to pay checks drawn on it until checks deposited with it drawn on the other bank had cleared, whereupon, the kite was discovered and the Brazeau Bank was unable to survive and was taken over for liquidation by the F.D.I.C. The Brazeau Bank had a loss of 18,000-odd dollars and the Altenburg Bank a loss of 15,000-odd dollars. Both banks were insured by Bankers Blanket Bonds issued by the insurance companies, both bonds providing loss of property from the premises through false pretenses, etc. Claims were filed and both insurance companies rejected them on two grounds: first, that no loss had occured of property from the premises since the banks paid the checks through the clearing house, and secondly, that both policies excluded any loss arising out of any loans and that these losses were the result of extending credit to the trucking company.

The United States District Court in Missouri did not accept the defense of no loss from the premises and held that the loss did in fact occur on the premises. What the court decided was that the making of the deposit of the checks and inducing the bank to credit the depositor's account was at that point the false pretense and that the later payment of checks against such balance established the loss. What the court in effect was saying was that it was the deposit of the check and the creation of the balance in the original instance which established the loss and that the fact that the funds were later paid out to someone other than the depositor and other than from the premises was not the controlling factor.

Both cases were appealed to the United States Court of Appeals for the Eighth Circuit and the decision of the lower court was sustained in both cases.

All forms of Bankers Blanket Bonds exclude losses arising out of the non-payment or default of loans unless the cause of the loss be dishonesty of an employee of the bank or forgery. Even if a loan be secured from the bank by trick, artifice or other false device, no part of such loan properly constitutes a claim under the bond.

In view of such exclusion, many losses occur where the problem is involved of where the loan exclusion applies notwithstanding the fact that larceny or false pretenses was involved in the case.

Such a situation was before the Appellate Division of New York in May of 1958 in the *Johnston Bank* case.[6] In that case, plaintiff bank was financing conditional sales contracts for an automobile dealer who was legitimately in the business of selling cars and taking in exchange conditional paper which involved notes payable over a period of time. The dealer had relatives and friends sign a number of contracts in blank which he delivered to the plaintiff bank and gave to employees of the bank necessary information to fill in the forms, such as to type of car, serial number, etc., whereupon the bank then accepted these contracts and credited the dealer's account.

Later an officer of the bank learned of the fictitious character of the sales agreements and called upon the surety company to make good under its bond on the ground that it had sustained a loss by reason of false pretenses, in that the dealer had falsely pretended the valid sale of cars and the

[4] *Federal Deposit Insurance Corp. v. Hartford Accident & Indemnity Co.*, U.S. District Court, Mo., 7/22/52, 106 F. Supp. 602; affirmed 204 F. 2d 933.

[5] *Bank of Altenburg v. Fidelity & Casualty Co. of N.Y.*, U.S. District Court, Mo., Dec. 1953, 118 F. Supp. 529; affirmed 216 F. 2d 294.

[6] *Johnston Bank v. American Surety Company of N.Y.*, 6 A.D. 2d 4.

obligations of the purchasers to pay for them and that he was guilty of false pretences. The insurance company denied liability on the ground that this was a loss to the bank arising out of a loan and that it was not intended to be covered under the policy. The court held that the exclusion did not apply. Notwithstanding the fact that the transactions were classified on the bank's books as loans, the trial court held and the Appellate Division affirmed without dissent that in the absence of proof that it was a general custom in the banking business to classify these transactions as loans, they were not to be so held and that the loss to the bank arose out of the purchase of paper and that the bank advanced funds against instruments which the seller knew were false.

A similar decision was made by the United States District Court, for the Southern District of Ohio, in December of 1954, in the *National Bank of Paulding* case.[7] In that case the bank's customer was in the seed and grain business and had been a customer of the bank for ten years. The system was that the customer would deliver a shipment of grain or seed to a railroad company and get from it an order bill of lading consigned to its own order at the destination of the customer and would then draw a sight draft on the purchaser payable to the plaintiff bank's order, attach the draft and an invoice to the bill of lading and present it to the bank. The bank would then credit the customer's account and send the draft and other papers to its correspondent bank in the city where the purchaser was located. When the sight draft was accepted and paid and plaintiff bank received the money it would charge the customer's account with a discount at a given rate.

Over a period of nine days the customer delivered a series of eight transactions with the plaintiff bank involving approximately $141,000. In such case the customer had not sold any grain on any of the eight transactions and all the papers which he prepared were spurious. Claim was filed under the Bankers Blanket Bond for the full amount of the loss and such claim was denied on the ground that it was a loss resulting from a loan and therefore excluded. The court held, notwithstanding the fact that the bank would have had a right to recharge the customer's account, or that a discount, which in effect was an interest rate, was charged, that these transactions were not loans, but were losses resulting from false pretenses.

Losses arising out of check kiting and situations involving fine lines as to whether it is or is not a loan are still in a state of development and further time and experience is required to clarify those situations.

It is fair to say and it should be said that it is not the intent of such bonds to insure against losses resulting from poor judgment, losses arising out of loans unless there is forgery or dishonesty of employees, nor is it the purpose of such bonds to insure the bank's operation as a careful, well-managed bank.

The check kiting situation has been the cause of much concern to banks in the past two years. The Committee on Bank Management and Research of the New York State Bankers Association has just completed an extensive investigation of this situation and has prepared a splended report entitled "Safeguards Against Check Kiting". The committee concludes its report with excellent recommendations for prevention and with the statement, "nor is complacent reliance on insurance coverage either warranted or safe. Under certain conditions a bank might find to its sorrow that the loss is not covered by its insurance."

The next insuring clauses are the forgery coverages and are commonly referred to as Insuring Clauses 4 and 5, or, in some bonds, D. and E.

Insuring Clause 4 covers forgery or alteration on checks, drafts, withdrawal orders, certificates of deposit and similar instruments. Under this insuring paragraph banks are covered against losses for paying checks bearing forged maker's signature, or endorsements or cashing or otherwise handling checks drawn on other banks which are forged or altered.

Insuring Clause 5 is known as the extended forgery coverage and such coverage indemnifies the bank against receiving, having extended any credit, or assuming any liability, or otherwise having acted upon any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, etc., or raised or otherwise altered or lost or stolen, and this same insuring paragraph in-

[7] *The National Bank of Paulding v. Fidelity & Casualty Co. of N.Y. and Maryland Casualty Company, U.S. District Court, Ohio,* 131 F. Supp. 121.

demnifies against guaranteeing or witnessing of signatures on stock powers and the like.

This insuring paragraph covers losses such as making loans against forged or counterfeit stock certificates. Within the past year several large banks in the New York City area have sustained substantial losses by reason of making loans to a man named Brenner against collateral purporting to be stock of a Yonkers bank, it having developed that such stock certificates were counterfeit and forged.

This insuring clause covers losses by reason of personal loans where the signature of a co-maker, such as a husband or wife, is forged. It covers hazards of buying or otherwise acting upon securities which are stolen or which are altered.

The problem which frequently arises under this extended forgery insuring clause is whether or not some particular document or series of documents is or were forged as to the name of the maker, endorser, etc.

An early case decided by the New York Court of Appeals 32 years ago on the subject is the *International Union Bank* case.[8] An individual whose true name was George D. Wagner opened an account in the plaintiff bank in that name and then opened an account in two other banks in two separate names. He deposited in the plaintiff bank checks to his order drawn on the two other banks in the name used by him in such other banks and the plaintiff bank paid out funds against these checks which were returned unpaid by the drawee bank.

The bank submitted claim under its insurance policy claiming that the checks were forged and the Court of Appeals was required to decide whether the use by Wagner of another name in the establishment of an account in another bank was a forgery. The court held that the use by one individual of two names with the intent to defraud was a forgery under the New York statute, saying

> "The instrument was falsely made, for it purported to bind the person other than the person who made it. It was therefore a forgery under the common law and under the statutes of this state."

The New York criminal statute defines forgery as

> "Including the false making, counterfeiting and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several general instruments."

The problem arose again in 1938 in the *Quick Service Box* case,[9] which was a decision by the Circuit Court of Appeals for the Seventh Circuit. That case was a suit under a forgery policy which indemnified against losses by reason of the forgery of the maker's signature. In that case an office manager had a vice president of the plaintiff sign checks in blank, after which he filled them out to the order of cash and added his own signature below that of the vice president as was required. The office manager used his own name; nevertheless the court held that his having completed the checks without authority by adding his name and title under the company's signature was a forgery within the meaning of the policy.

The United States Court of Appeals for the Second Circuit in New York did not go along with this theory in the *Fitzgibbons Boiler* case.[10] In that case the court was asked to hold that when an assistant treasurer signed substantial checks in his name and in such capacity with intent to defraud the plaintiff and steal the proceeds, such was a forgery within the meaning of the policy. The court held that the misuse of the assistant treasurer's authority even with a fraudulent intent was not forgery and said with respect to the *Quick Service Box* case that it represented a minority view and was not the law of New York.

The situations which have caused the greatest difficulty are those losses sustained by banks, generally in connection with loans, where the bank has acted upon, accepted or received, generally as collateral security, such as warehouse receipt, bills of lading and the like, which bear the signature of the borrower, but the instruments themselves are false in the sense that they do not in fact represent what they purport to be.

A Philadelphia bank loaned substantial sums of money, receiving as security ware-

[8] *International Union Bank v. National Surety Company*, 245 N.Y. 368.

[9] *Quick Service Box Co., Inc. v. St. Paul Mercury Indemnity Co.*, 95 F. 2d 15.

[10] *Fitzgibbons Boiler Co. v. Employers Liability Assurance Corp.*, 105 F. 2d 895.

house receipts supposedly representing 632 barrels of liquor. When the borrower went into bankruptcy and the loan was called it was then discovered that there was only 141 barrels of liquor and that these were subject to prior liens. The warehouse receipts were signed by and in the name of the individuals of the warehouse company who were supposed to sign warehouse receipts, but the information, meaning the quantity of barrels filled in the body of the receipt, was false.

Suit was filed on the bond, it being contended that the false statements in the warehouse receipts constituted forgery under Pennsylvania law.[11]

The court affirmed a judgment of the lower court in favor of the bank, saying that the making of the false statements in the warehouse receipts is a forgery in Pennsylvania even though the signatures to the same were not actually forged.

After this decision, Clause 5, or Insuring Clause E, being the extended forgery coverage, was amended to thereafter exclude false statements in the body of the instrument by stating that the forgery was limied to the signature of the maker, endorser, etc.

In 1956 the United States District Court in Wisconsin in the *Security National Bank of Durand*[12] had before it this situation. Plaintiff bank had loaned for considerable period of time money to Chain-O-Lakes, Inc., a corporation, taking as security accounts receivable which were assigned to the bank as evidenced by an invoice with a written assignment on its face signed by Chain-O-Lakes, Inc. by Irving Koren, president.

The bank's customer assigned to the bank invoices with a value of 21,000-odd dollars against which the bank advanced and loaned 17,000-odd dollars. Thereafter it was discovered that these invoices were fictitious and that they did not represent the sale of any merchandise and that no sums were due the customer thereon.

Suit was filed on the Bankers Blanket Bond, it being contended that there was a forgery of the maker's name, it being argued that forgery was not limited to the false writing of another's name, but that it can be accomplished by the use of one's own name for a false purpose. The court referred to the *Quick Service Box* case, stated that the invoices and assignments were unauthorized, false and fradulent, and that they were forged within the meaning of the policy. This decision was affirmed by the court of appeals.

It is respectfully suggested that the effect of this decision, if it were to be followed, is to afford assigned accounts receivable coverage under a forgery section of the bond, and that is not the intent of either party. Such coverage is difficult to secure if directly applied for and is very expensive.

A late case on this subject is the *Fidelity Trust Company* case.[13] In that case the United States District Court of Pennsylvania had the situation of where a bank made a series of loans to a customer against promissory notes collateralized by the assignment of accounts receivable all signed by either the president or a vice president of the corporate borrower. It developed that the accounts receivable were fictitious and the goods indicated thereon were never ordered by or shipped to the purchaser.

Suit was filed on the Bankers Blanket Bond, it being alleged that the invoices were counterfeit. It was admitted that the signatures of the makers or the persons whose names appeared were genuine, so that while no attempt was made to claim coverage on the ground of forgery, it was contended that the losses resulting from the loans were covered under the extended forgery coverage because the bank had accepted and acted upon documents which were counterfeited.

The district court agreed with the bank and held the bond applied. Upon appeal to the Third Circuit the decision below was affirmed on the theory that the bond insured against documents which were counterfeited or forged, by its terms indicating that the instruments being false, they were counterfeited within the policy terms. The court would not accept the argument that the word "counterfeited" was limited by the phrase thereafter following "as to the signature of any maker."

The last case on the subject is the decision of the Supreme Judicial Court of Massachusetts in the *Rockland-Atlas Na-*

[11] *Provident Trust Co. v. National Surety Corp.*, 138 F. 2d 252.

[12] *Surety National Bank of Durand v. Fidelity & Casualty Co. of N.Y.*, 145 F. Supp. 667; affirmed 246 F. 2d 582.

[13] *Fidelity Trust Company v. American Surety Company and Hartford Accident & Indemnity Co.*, 174 F. Supp. 630; affirmed 268 F. 2d 805.

tional Bank of Boston case,[14] which is one of the most interesting and important cases on this subject decided in many years. The facts were that an officer of the Guaranty Trust Company of Waltham, Massachusetts, communicated with an officer of the plaintiff bank asking it to participate to the extent of 100% of a $25,000 loan to be made by the Waltham bank to the Nashua Sales Co., Inc. This officer of the Waltham bank told the officer of the plaintiff bank that Nashua's financial condition warranted making of the loan and that he had before him a financial statement of Nashua certified to by a C.P.A. He read the figures contained in the balance sheet and the plaintiff's officer, relying on these representatives, agreed to participate in the whole loan.

Guaranty made the loan of $25,000 to Nashua, received a demand note, and credited Nashua's account and its officer mailed to the plaintiff a participation certificate and copies of the balance sheet, profit and loss statement and a purported letter from a C.P.A. stating that he had made an examinaion and that the assets and liabilities shown in the statement in his opinion fairly represented the borrower's position.

The plaintiff bank received and examined these documents and accepted the participation. It thereafter developed that the statement and the letter from the C.P.A. were false and the purported signature of the accountant was not made by him or with his authority.

Claim was filed under the bank's Bankers Blanket Bond on the ground that it was entitled to be covered for the loss because the signature of the accountant was forged on the letter of certification.

Clause E, or extended forgery coverage, covers among other things loss through the bank's having "given any value — on the faith of — any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any — person signing in any — capacity." The court held that such words did not include the certified balance sheet or the purported accountant's letter.

The law of forgery, both from a criminal and civil standpoint, both at common law and in statutory law, has been developing for a long time. Through the medium of the Uniform Negotiable Instruments Act and lately through the Commercial Code, which has now been enacted in five states, greater uniformity may be anticipated.

Perhaps the most common meaning to the ordinary layman dealing with the word is the writing of a name of another with intent to defraud. The trend of the decisions has been to continuously broaden the meaning of the word and to hold things to be forged which the parties to the contracts containing indemnity against losses resulting from forgery would never have dreamed were to be involved. Whether the time may shortly come that its interpretation must be spelled out and its limits confined in bonds such as we are discussing remains yet to be seen, but probably will depend upon the extent to which the courts may broaden its meaning or apply its meaning to a given situation and to the extent which insureds may insist upon its application.

It is indeed a tribute to the fairness and integrity of both the banking and the insurance industries that so little difficulty and so little litigation has been necessary in the extensive negotiation between them where 14,000 banks and many insurance companies daily must deal with situations involving problems of dishonesty, false pretenses, theft, forgery and such words.

It is my firm belief that the continuance of the intelligent and fair approach which the representatives of these two great industries bring to these loss and coverage problems will result in a satisfactory solution of almost all problems which arise.

[14] *Rockland-Atlas National Bank of Boston v. Massachusetts Bonding & Insurance Co.*, 157 N.E. 2d 239. See also "The Reversal of an unwarranted Trend", G. Arthur Blanchet, 26 Insurance Counsel Journal 491.

Contractual Indemnity

J. Ralph Dykes
New York, New York

THIS is a report on the case of *General Electric Company v. Moretz, et al.*, 270 F. 2d 780, Court of Appeals, Fourth Circuit, September 16, 1959. General Electric Company shipped a trailer load of its products, employing Mason and Dixon Lines, a trucking concern, under a contract of transportation under which General Electric loaded the trailer and turned it over to Mason and Dixon Lines to haul to its destination. General Electric carelessly loaded the trailer before it was delivered to Mason and Dixon Lines. After the latter took possession of the trailer and while in its possession, the load shifted due to the careless loading by General Electric, causing injuries to the truck driver employed by Mason and Dixon Lines. Workmen's compensation was paid by Mason and Dixon Lines to the truck driver who thereafter sued General Electric for common law damages, growing out of its negligence in improperly loading the trailer. General Electric impleaded Mason and Dixon Lines for indemnity on the ground that a contractual duty was owed by Mason and Dixon Lines to General Electric, which duty was violated.

The judgment, of course, went against General Electric in favor of the plaintiff driver.

At this point it would seem that the case must come to an end, as the rest of it was a claim by General Electric against Mason and Dixon Lines for damages growing out of the latter's negligence, which claim would ordinarily be barred because of the contributory negligence of General Electric. Under the substantive law of Virginia, where the accident happened, contributory negligence is a bar to recovery of damages for negligence, and General Electric had just been held liable to the plaintiff driver for its negligence, so that there could be no question but that the contributory negligence of General Electric had been well established. But such was not the result, and this is where the case takes a very interesting turn. The court in awarding full indemnity from Mason and Dixon Lines to General Electric viewed the situation as one not involving the principles of negligence but involving a lot of obligations and duties arising under the contract between General Electric and Mason and Dixon Lines and involving also the pertinent regulations of Interstate Commerce Commission, the violation of which by Mason and Dixon Lines, of course, was certainly one proximate cause of the accident. The court based its decision on the ground that at the time of the accident, the responsibility for the safe loading of the cargo in the trailer had, under the contract between General Electric and Mason and Dixon Lines, passed from General Electric to Mason and Dixon Lines and on this point, the established contributory negligence of General Electric was excused.

The decision is another departure from the traditional legal pattern which was that, in the absence of an express agreement of indemnity, there could be no indemnity except on the basis of negligence law and the theories of active or passive and primary or secondary negligence.

Analogy was drawn between the instant situation and the one in *Ryan*.[1] There was no express agreement of indemnity in *Ryan* nor was there any express agreement of indemnity between General Electric and Mason and Dixon Lines in the instant case. There have been many comments on and various interpretations of the *Ryan* decision but, when they are all considered, it is evident that *Ryan* involved the familiar situation of a person with a non-delegable duty, on whom a so-called vicarious liability lies. There was imposed upon the Steamship Company a "vicarious" liability based upon a non-delegable duty to provide a seaman with a safe place to work. The stevedoring company through its active negligence created the unsafe place to work on the ship but the only negligence on the part of the ship-

[1] *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.* 350 U.S. 124.

Mr. Dykes *was born in Maryland and educated at Columbia University, Johns Hopkins University and the University of Maryland. He is admitted to the bars of Maryland, Nebraska and New York. He practiced law in Nebraska for some ten years and, since 1931, has been with United States Casualty Company as assistant to general counsel and in charge of casualty claims.*

owner was passive negligence. Under the historic rule, the one who was held for mere passive negligence was entitled to indemnity from the one who was actively negligent. This would seem to be entirely clear from the later decisions of the Supreme Court in the cases involving the "vicarious" liability of the shipowner but recognizing the right of the shipowner to indemnity from the stevedoring companies whose active negligence brought about the unsafe places to work. But there was no such "vicarious" liability on the part of General Electric. Its negligence was not passive. It was active negligence, thus creating a situation involving two joint tort feasors, both of them actively negligent.

But apparently a new pattern has emerged which might be called *contractual indemnity*. Briefly stated, when A contracts with B there is in that contract an agreement, whether expressed or not, that A will indemnify B for damages caused by A's breach of the contract which resulted in damage to B, even though A's breach consists of a pure tort in which each A and B is an active joint tort feasor. In the instant case, quoting from the opinion:

> "In the pending case the agreement of the contractor to see that the equipment was properly loaded before transporting it likewise involved an agreement to indemnify the shipper in case of loss".

and this notwithstanding that the contract contained no expression of any intent to indemnify. The court seemed to say such a contract has inherent in it the implied agreement to indemnify.

Thus the reference in the instant case to *Weyerhauser S. S. Co. v. Nacimera Operating Co.* 355 U.S. 563 in which it was pointed out that, in the area of contractual indemnity, the application of the theories of active or passive as well as primary or secondary negligence is inappropriate.

The *Westchester* case[2] was cited. In that case there was no express agreement of indemnity but the expression "quasi contract" was used to signify a situation having the same effect as an express agreement to indemnify would have. Under this "quasi contract", a contractual duty arose, the violation of which entitled the aggrieved partly to indemnity.[3] Since the *Westchester* case was decided, I have made many efforts to persuade lawyers in various parts of the country to use it and have not been successful, the reply invariably being that "the courts in my state would not follow any such rule".

The new pattern is a dubious one. The traditional rule of damage for breach of contract has been the cost of performing the breached contract but, if the breach involved negligence, then damages could be asserted for negligence. *Miller v. Morse*, 9 A.D. 2d 188 (New York). In the instant case, the breach of contract between General Electric and Mason and Dixon Lines involved negligence for which General Electric was held liable. It was therefore a tort feasor and, under the law of Virginia where the accident happened, should have been entitled only to contribution.[4]

It would seem from this *General Electric* decision that the new pattern of contractual indemnity is now established. If so, it is a very complicated one and difficult to apply to given situations. Is the liability under this contract as interpreted in this case a liability imposed by law as distinguished from assumed liability?[5] What now becomes of the distinction between the so-called "legal liability" and "contractual liability"? Under this decision, can it be said that the liability to indemnify is not a liability assumed under any contract or agreement? Would not an insured in a liability insurance policy, when he enters into such a contract automatically assume a liability under a "contract or agreement"?

It seems to this writer that it would have been far better to have left the solution in the fields of negligence law and express contracts of indemnity.

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[2] *Westchester Lighting Company v. Westchester County Small Estates Corporation*, 278 N.Y. 175.

[3] The result in the *Westchester* case was proper after the hurdle of the asserted exclusive remedy of the workmen's compensation act. But the language in the opinion confused the true situation which was that the lighting company had a gas pipe in the street and was under a non-delegable duty to the public. The defendant negligently broke the gas pipe which caused the injury to plaintiff, an employee of the defendant, who recovered from the lighting company because of the latter's non-delegable duty. The lighting company as a passive wrong doer was therefore entitled to indemnity from the defendant who was the active wrong doer.

[4] For a working definition of *indemnity* and *contribution* in negligence law see an article, *Recovery Over*, by William E. Knepper, in the October 1946 issue of the Insurance Counsel Journal.

[5] The insuring clause in the liability policy covers sums which the insured shall become legally obligated to pay. The exclusion in the absence of products liability coverage excludes liability assumed by the assured under any contract or agreement.

Fire Insurance Problems in Real Estate Transactions*

SOL MORTON ISAAC
Columbus, Ohio

BEFORE Judge Joseph M. Harter became a member of the Court of Common Pleas of Franklin County, Ohio, in 1951, he was considered to be an outstanding authority on fire insurance law. Judge Harter recognized that insurance problems often receive scant attention from laymen or lawyers in the sale and purchase of real property. He also recognized that litigation of a complex nature could rather easily be avoided if simple precautions were taken. So, Judge Harter prepared an analysis of conflicting interests involved in a loss to property occurring after a contract of sale has been effected.**

Judge Harter's concern with the subject is justified by the growing acceptance of a Uniform Vendors and Purchasers Risk Act, not yet adopted in Ohio, and by the volume and confusion in litigation exemplified, particularly in three rather recent annotations in 27 A.L.R. 2d 444, 64 A.L.R. 2d 1402 and 65 A.L.R. 2d 989.

This analysis, based upon Judge Harter's original paper, is an attempt to bring the subject up to date and to review the situation in the light of more recent developments here in Ohio and elsewhere.

This is one of those subjects, all too familiar to lawyers, which the layman is apt to consider unimportant because he believes that the incidence of loss occurs so infrequently. Yet, as lawyers well know, it is often the relatively infrequent occurrence which produces some of the most difficult legal problems and often leads to unexpected results. If the possibility of such consequences can be minimized or avoided by a simple, routine procedure, lawyers and laymen alike ought to follow such a course consistently. Such a procedure is effective in this instance. It is our purpose to urge you to follow this simple course to avoid complex difficulties.

Our problem is the fixing of the risk of loss and the recovery of insurance proceeds in the event of damage to or destruction of property from an insured hazard before a sale of such property has been consummated. It is quite usual at the closing of a real estate transaction to have one of the attorneys remember that immediaely after the delivery of the deed something should be done about the fire insurance. Ordinarily, at that moment a hasty call is made to the agent of either the seller or purchaser and a binder is effected to protect the new owner. It is far more unusual that anyone will think of this problem when the purchase contract is entered into, much less when merely an option to purchase is acquired. Yet, a considerable amount of litigation has resulted because property has been destroyed or seriously damaged before a sale has been consummated. The occurrence is not as infrequent as one might suppose.

As I hope to demonstrate, the Ohio law on this subject is confused. It must be pieced together from ancient opinions and concepts which may not be valid today or from more modern cases which are either unimpressive or merely analogous. We

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*From a paper delivered before the Columbus (Ohio) Bar Association, January, 1960.

**See 17 Insurance Counsel Journal 156, April, 1950.

shall have to rely somewhat on the law as developed elsewhere, but which, also, is far from well-established.

There can be no doubt that originally, and for most purposes, a fire insurance contract was held to be a "personal contract of indemnity." Substantially, the whole theory of fire insurance law has been based upon that assumption. The immediate consequence of the unqualified application of that principle is that the insured person rather than the property, the subject of insurance, becomes the chief concern of the law.

This principle was applied in an early Ohio case, *Gilbert and Ives v. Port* (1876) 28 Ohio St. 276, which involved a problem of the distribution of the proceeds of a fire insurance policy, voluntarily paid by the insurance company, as between a lessor (who had procured the insurance) and a lessee who had an option in the lease to purchase the property. The lessee, after the fire, sought to exercise his option and to obtain the insurance proceeds. His attempts were unsuccessful. The court found that the lessee had been in default under his lease and had not yet elected to exercise his option at the time of the fire. The lessor was allowed to keep the insurance proceeds upon the "personal contract of indemnity theory." The court said, by way of dicta:

"The contract of insurance does not attach to the property insured, nor, in the case of sale, either before or after loss, does it pass to the purchaser by operation of law, in the absence of a stipulation to that effect. It is a contract of indemnity against the loss covered by the policy, and inures to the benefit of the person with whom it is made or those falling within its terms. As soon as the interests of such persons cease, it is at an end."

While this statement is consistent with the generally accepted concept of insurance, one wonders what rationale the court would have employed if the lessee had properly exercised his option before the fire and had thus turned the lease into an executory contract of purchase. The indicated result from the language of the court is clear, but the law has not uniformly developed that way.

The situation becomes more confused because this doctrine of the insurance contract has been consistently applied to the mortgagor-mortgagee situation. As early as 1851, in *McDonald v. Black*, 20 Ohio 185, the supreme court held that:

"A mortgagee cannot claim the benefit of a policy of insurance effected upon the mortgaged property by the mortagor. Each have insurable interests, but neither can, as a general rule, take advantage of an insurance effected by the other."

You will readily see how the practice of mortgage clauses and endorsements in insurance policies grew from this court-pronounced legal principle.

However, the problem of insurable interest and right to proceeds of insurance as between the vendor and purchaser does not rely solely upon insurance law. It is considerably affected by real estate law. The doctrine of equitable conversion, which might be better expressed as "equitable confusion", attaches to the title of real estate after the execution of a valid contract of sale.

The effect of such a contract upon the property rights of the parties seems well-settled in Ohio.

First: Such contracts subtracts from the absolute ownership of the vendor, and transfers to the purchaser, an equitable estate in the land equal to the amount of the purchase money paid.

Second: Such contract converts the vendor's real estate into personal property. That is, the vendor now has a chose in action represented by the purchaser's obligation to pay the purchase price. After such a contract is executed and any part of the purchase price is paid, the vendor's property right — as personalty — pass to his executor and not to his heirs, and the purchaser's property rights — as real estate — pass to his heirs and not to his executors.

A leading authority for these principles is *Coggshall v. The Marine Bank Co.*, 63 Ohio St. 88, 57 N.E. 1086, which was followed in *Butcher v. Lumber Co.*, 164 Ohio St. 85, 128 N.E. 2d 54, but it is interesting to note that in this late case the decision was four to three with two separate dissenting opinions. The doctrine of equitable conversion is rarely denounced. But many attempts are made to avoid its consistent application.

In II Ohio Jurisprudence 2d 656, the statement is made that a consequence of the doctrine of equitable conversion is that "if the real estate depreciates, or a part thereof is destroyed, the loss is on the purchaser and by the same token any benefit

accruing to the land belongs to the purchaser." The authority cited for this statement is the dicta in the old case to which I referred earlier — *Gilbert and Ives v. Port.*

This principle seems to be supported in *Oak Building and Roofing Co. v. Susor,* 32 Ohio App. 66, 166 N.E. 908. But, a case, overlooked by the annotator, possibly because the opinion is not a distinguished one, citing no authorities for its conclusions, is *Peck v. Hale,* 11 Ohio App. 418. In that case a sale of real estate had been made. The deed had been placed in escrow and before the escrow was discharged, the property was damaged by fire. The insurance money was paid to the vendor. The Court of Appeals for Cuyahoga County held that:

"Payment by the insurance company was for the benefit of the property, and the money paid to the vendor is for the benefit of the vendee, providing the vendee complies with the terms of the escrow agreement."

This case seems clearly in conflict with the reasoning of both the supreme court case and of the later appellate case, which did not, however, deal with insurance proceeds, but only with the incidence of loss.

The confusion or uncertainty which becomes apparent in a review of the Ohio case law is duplicated when one examines the law throughout the country. There is considerable disagreement among courts as to the burden of the loss in a destruction of property. Much of the disagreement is influenced by the time when the destruction occurred and the situations between the parties at that time. Some courts, especially in New York, have held that the doctrine of equitable conversion has no proper application in cases of loss by casualty which occurred before the time has arrived and the conditions have been performed precedent to a conveyance. This would appear to be the reasoning of the earlier Ohio court of appeals case, but in conflict with the logical consequences of the dicta in *Gilbert and Ives v. Port* and of the later appellate decision.

If these latter cases are followed, they would seem to place Ohio in line with what might be called the conservative rule, adopting the full consequences of the doctrine of equitable conversion. Cases from approximately fourteen states seem to concur in this application.

There are also limited applications of the doctrine appearing in many jurisdictions and there is a Massachusetts rule which simply terminates the contract after a casualty. This rule has been applied in most of the New England states, as well in some others.

One of the variations of the doctrine placed the risk of loss upon the person in possession at the time of the casualty. This is the theory promoted by the Uniform Vendors and Purchasers Risk Act, drafted by Samuel Williston of contracts and Harvard Law School fame. This statute as of 1958, had been adopted in California, Michigan, New York, South Dakota, Wisconsin, Hawaii and Oregon.

When the problem of fixing the risk of loss is compounded by the necessity to distribute insurance proceeds, the issues become more involved. There is some case law to the effect that if the contract is silent as to insurance, a vendor who has maintained insurance on the property at his own expense and in his own name is entitled to the proceeds thereof, even though the loss occasioned by the destruction of the property may fall on the purchaser. However, the great majority of the cases have applied a theory of constructive trusteeship and held that the vendor's insurance policies were held by the vendor for the benefit of the purchase to be credited on the purchase price of the destroyed property.

The statement of the proposition, however, does not reveal the torture that the courts often go through to reach the result. It is obvious that ancient doctrines must be bent, broken or ignored. An illustration is a recent New York case, *Raplee v. Piper,* 3 N.Y. 2d 179, 143 N.E. 2d 919, 64 A.L.R. 2d 1397.

In that case, the purchaser sought to have the vendor apply fire insurance proceeds to the purchase price. It appeared that pursuant to the contract, the insurance premiums on the policy, taken out in he name of the vendor, had been paid by the purchaser. The loss occurred while the purchaser was in possession but before complete performance of the contract. The court held, four to three, that the purchaser was entitled to the insurance proceeds. The majority relied partially on a trust fund theory, but mostly simply upon a conclusion that the insurance had been taken out for the benefit of both parties. The minority vigorously disagreed, emphasizing the ancient doctrine that a policy

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of insurance is a personal contract and asserting that in the absence of agreement the proceeds belong unequivocally to the named insured. The disagreement over the application of basic principles would not seem to be permanently resolved. One wonders, for example, what the Supreme Court of Ohio would do with this New York case in the face of the only Ohio precedents available.

One hesitates to complicate the problems further, yet some consideration should be given to the insurance contract itself. For many years insurance policies had been largely the result of individual negotiations. In 1873 the first standard fire insurance policy was adopted in Massachusetts and in 1881 in New York. There have been many changes in the standard form, but New York's 1943 form was basically adopted in Ohio in 1944.

All policy forms in general use prior to the adoption of the 1944 form contained certain "moral hazard" controls — provisions calling for avoidance of the policy completely, or later for the suspension of liability, in the event the moral hazard should be increased. The courts construed these provisions to render the policy void if a change of title occurred, even though an insurable interest might remain in the insured. It was considered that, since the policy of insurance was a personal contract, the insurance company was interested in the person of the insured and could not be compelled, in effect, to contract with persons unknown who, having some interest in the property, might increase the hazards to it. *Bates v. Insurance Company*, 2 Cincinnati Superior Court, 195; *Insurance Co. v. Archer*, 36 Ohio St. 608.

The provisions of those earlier policies were relatively severe and, when captiously invoked, might produce great hardship. These defenses, however, were seldom asserted by insurance companies unless there was sound reason for their assertion — potent suspicion of arson or an attempt at a "profit" through a fire, for example.

Since the adoption of the new policy form in Ohio in 1944, the question has become: "What is the interest of the insured?" Title defenses have been eliminated. In place of the eliminated clauses, we find in the insuring clause a limitation upon the amount of insurance in these words:

> "***nor in any event for more than the interest of the insured***"

Only two Ohio cases apparently have dealt with this "interest" problem, both decided prior to the 1944 policy form, but with substantially the same language before the courts. In both cases the courts held that the insured, having less than the whole interest in the property covered by insurance, could collect only a pro rata portion of the insurance proceeds. *Summer v. Stark County Patrons Mutual Ins. Co.*, 63 Ohio App. 369, 63 N.E. 2d 1021; *Knight v. Eureka Fire and Marine Ins. Co.*, 26 Ohio St. 664.

The rationale of these cases seems to be based upon the original doctrine that insurance is a personal contract. The doctrine, then, continues to affect the resolution of insurance problems and must be considered in any attempt to predict the solution of future cases.

It is firmly established that to prevent an insurance policy from being a wager and, as such, against public policy, there must be an insurable interest held by the person insured. It is clear that both the vendor and the purchaser have an insurable interest in the property under contract of sale. But what is not clear is the effect any change of "interest" in and to the property will have, first, upon the right of the insured vendor to collect all or any of the proceeds of his policy and second, upon his duty to account to the purchaser. If, in fact, the risk of the loss is to be thrown upon the purchaser, is there not a danger of the vendor recovering both from the insurance company and the purchaser?

One does not have to denounce the ancient doctrines to prevent this unfortunate result. Since insurance is an indemnity only, this problem is probably resolved by the law of subrogation. The vendor may recover either from the purchaser, in which event he has no loss, or if he is paid by the insurance company, it then becomes subrogated to his rights over against the purchaser. Only the poor purchaser is unprotected at this point. Does he have to buy damaged goods? Will the Ohio law extend to him the constructive trust theory or some modification thereof, so that he is not the ultimate loser? One can only guess.

Before concluding with a simple solution for these complex and largely unresolved

problems, it is important to note that many contracts of sale attempt to avoid the problems raised by a casulty loss. The standard contract to purchase real estate adopted by the Columbus Association of Real Estate Brokers and approved by The Columbus Bar Association provides that if the property is damaged or destroyed before consummation of the contract, the purchaser may elect either to proceed with the contract in which event he is entitled to all of the proceeds of insurance, if any, payable to the vendor, or, he may rescind the contract.

I know of no reported case which has construed this provision. It would seem to protect the purchaser, if he does, in fact, desire to rescind the contract. I am not so certain of the legal consequences if the purchaser wishes to complete the contract and receive the proceeds of insurance. The insurance company is not a party to the contract of sale. If the courts follow the personal contract theory, then the solution in the real estate contract might become something less than fully satisfactory. It is possible, however, that the terms of the real estate contract will be construed to prevent application of the doctrine of equitable conversion and thus leave the vendor in the full "interest" in the property insured.

Of course, we must also recognize that many contracts of sale do not use the standard forms and thus retain the possibility of the many problems we have discussed.

Some might wonder whether the Ohio Valued Policy Law affects this problem. This law (Section 3929.25, R.C.) provides, in substance, that any company insuring a building or structure against loss by fire or lightning shall cause such buildings to be examined by its agent and its insurable value fixed. Then, in the event of total loss, in the absence of change increasing the risk without the consent of the insurer and of intentional fraud on the part of the insured, the whole amount of the policy upon which the insurer has received a premium shall be paid.

This statute opens up many questions which are beyond the scope of this discussion. In the *Summer* case, cited above, however, the court of appeals, speaking of the application of this law to the insuring of less than full ownership of a building, held that the statute did not make an insurance company responsible for ascertaining the actual ownership of the premises or the extent of the interest of the insured. On the contrary, it required the insurance company only to determine from its examination whether it would insure the building, and if so, for what sum; and that when it chose to assume a risk, it would be bound by its examination and valuation. So, under the "interest" policy as thus construed in one Ohio case, the valued policy law does not compel the payment of the face amount of the policy where less than the "whole ownership" is insured.

The simple solution to all of this — which I hope you have awaited with bated breath — is to see to it that the purchaser becomes a named insured when the contract of sale is executed. The simple process of calling the agent and notifying him of the interest of the purchaser ought to avoid all legal difficulties, since then, his interest, if any, will be fully protected. The policy should be examined at that time both as to coverage and expiration date. It is wise to secure a memorandum of the endorsement from the agent. Although *Hall v. Franklin Fire Insurance Co.,* 149 Ohio St., 216, 78 N.E. 2d 360, held that the agent's oral assurance is probably sufficient to bind the company, it is possible that this legal pronouncement will not be followed in its full implications. Then, when the purchase is finally consummated, there need be no unseemly haste to procure insurance. That step can be handled at a more leisurely and considered pace.

It is well to remember that no policy has too many insureds. Many policies have too few. An insurance agent is only too happy to protect the interests of his customer if he is advised of them. He can fight the customer's battles successfully, if he knows the war is on. He should be given a chance to work before the fire. Afterwards, it may be too late.

Perhaps, all of this is one small reason why people ought to consult a lawyer before they sign a purchase contract. But I rather suspect we shall resolve the legal problems before we figure out how to persuade them to do that.

Tort Liability of Ohio Charitable Institutions

RICHARD L. MILLER
Columbus, Ohio

WHEN the Supreme Court of Ohio announced its decision in *Avellone v. St. John's Hospital*[1] on July 18, 1956, it greatly changed the existing Ohio rule as to the liability of nonprofit hospitals and removed their previous immunity from liability to paying patients.[2]

The old rule had been that a charitable or eleemosynary institution was not liable for tortious injury except (1) when the injured person was not a beneficiary of the institution, and (2) when the institution failed to exercise due care in the selection or retention of a negligent employee. This rule was established by a long line of cases including *Cullen v. Schmit* (1942), 139 Ohio St. 194, 39 N.E. 2d 146; *Taylor v. Flower Deaconess Home and Hospital* (1922), 104 Ohio St. 61, 135 N.E. 287, 23 A.L.R. 900; *Rudy v. Lakeside Hospital* (1926), 115 Ohio St. 539, 155 N.E. 126; *Sisters of Charity of Cincinnati v. Duvelius* (1930), 123 Ohio St. 52, 173 N.E. 737; *Waddell, a Minor, v. Young Woman's Christian Assn.* (1938), 133 Ohio St. 601, 15 N.E. 2d 140; and paragraph two of the syllabus in *Newman, A Minor, v. Cleveland Museum of Natural History* (1944), 143 Ohio St. 369, 55 N.E. 2d 575. See, also, 9 Ohio Jurisprudence 2d 132, Section 49.

In the *Avellone* case, the court overruled the *Taylor* and *Rudy* cases, *supra,* and simply held:

> "A corporation not for profit which has as its purpose the maintenance and operation of a hospital, is under the doctrine of *respondeat superior,* liable for the torts of its servants."

That doctrine was declared in *Pierce v. Yakima Valley Memorial Hospital Assn.* (1953), 43 Wash. 2d 162, 260 P. 2d 765, and has been supported in recent cases in other jurisdictions, as, for example, *Bing v. Thunig* (1957), 2 N.Y. 2d 656, 143 N.E. 2d 3; *Wheat v. Idaho Falls Latter Day Saints Hospital* (1956), 78 Idaho 60, 297 P. 2d 1041; and *Collopy v. Newark Eye and Ear Infirmary* (1958), 27 N.J. 2d 29, 141 A. 2d 276.

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After some three and one-half years under the *Avellone* rule, the Ohio court was recently presented with the question:

> "What is the present rule of public policy in Ohio with reference to *respondeat superior* tort liability or nonliability of a religious and charitable institution (not a hospital) in an action by a patron of such institution's facilities?"

After examining the authorities and recommitting itself to the rule of the *Avellone* case in respect to nonprofit hospitals, the court refused to apply that rule to other religious and charitable institutions. The case in which this conclusion was reached is *Gibbon v. The Young Women's Christian Association,*[3] decided January 27, 1960. The express ruling of the court is found in the first syllabus, which reads:

> "A charitable or eleemosynary institution, other than one which has as its purpose the maintenance and operation of a hospital, is, as a matter of public policy, not liable for tortious injury except (1) when the injured person is not a beneficiary of the institution, and (2) when a beneficiary suffers harm as a result of failure of the institution to exercise due care in the selection or retention of an employee. *(Cullen v. Schmit* (1942), 139 Ohio St. 194, and *Waddell, a Minor,*

[1] 165 Ohio St. 467, 135 N.E. 2d 410.

[2] See "Charitable Institution Defense Abrogated in Ohio", by William E. Knepper, 23 Insurance Counsel Journal 300 (July, 1956).

[3] 170 Ohio St. 280, 164 N.E. 2d 563.

v. Young Women's Christian Assn. (1938), 133 Ohio St. 601, approved and followed)"

In the opinion of Herbert, J., the court recognized "the wide disparity and irreconcilable divergence among the decisions in the various jurisdictions in this country."[4] It also noted that, in 1959, the General Assembly had failed to pass, over the Governor's veto, a bill that would have exempted a "nonprofit corporation, society, or association organized exclusively for religious, charitable, educational or hospital purposes" from *respondeat superior* tort liability, except in cases of gross negligence.

Judge Herbert further said:

> "In the *Avellone case*, in which the issue was presented on pleadings as in this case, the court felt that changed modern operating conditions of nonprofit hospitals required it to reject and abandon the previously declared public policy. Similarly compelling reasons are not established to the satisfaction of the majority in this case, particularly in the light of the recent legislative developments recited herein showing the conflict of views in the area of charitable immunity or liability. Therefore, we decline to again declare an extension or modification of public policy. We feel that under these circumstances the doctrine of *stare decisis* should be applied and followed in order, if for no other reason, to avoid retroactive imposition of liability on a charitable institution which would result from the declaration of a different public policy—and we hold accordingly. Any legislative enactment declaring a different policy could only be prospective in its operation."

In a separate concurring opinion, Taft, J., observed that in the *Avellone* case the question was as to the liability of the hospital to a "paying patient" and commented:

> "That case did not involve, as does the instant case, the question as to liability on account of injury to or death of one who neither made nor was obligated to make any payment that could reasonably be said to represent a substantial equivalent for the benefits that he sought to receive from the charitable institution; and, assuming that it did involve such question, the opinion does not indicate that the court considered whether the duty owed to such a beneficiary would be more than a duty to exercise some lesser degree of care than that of ordinary care. See *Scheibel v. Lipton*, 156 Ohio St., 308, 102 N.E. 2d, 453."

In another concurring opinion by Bell, J., in which Zimmerman and Matthias, JJ., joined, the writer expressed disagreement with "the recognition of one rule for a charitable institution that operates a hospital and the perpetuation of a contrary rule for a charitable institution that does not." These three judges concurred in the judgment solely on the ground that the petition did not state sufficient facts to constitute a cause of action.

It is interesting to note that in the opinions in the *Gibbon* case there was no discussion of the availability of liability insurance to protect the institution, as appeared in the *Avellone* case.[5]

The result reached by the Ohio court seems to have a parallel only in the state of Washington where nonprofit hospitals do not have immunity from liability[6] that extends to other religious and charitable institutions.[7]

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[4]See 25 A.L.R. 2d 1-200.

[5]See Footnote 2, *supra*.

[6]*Pierce v. Yakima Valley Memorial Hospital Ass'n.* (1953), 43 Wash. 2d 162, 260 P. 2d 765.

[7]*Lyon v. Tumwater Evangelical Free Church* (1955), 47 Wash. 2d 202, 287 P. 2d 128.

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

Medical Cross-Examination Suggestions

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WHATEVER the forum, one is likely to encounter claims for the aggravation of a pre-existing disease. Medical opinions in their support frequently fringe on speculation because of a lack of substantive proof, resulting in what is, primarily, simply a subjective evaluation. Nevertheless, the opinions are from physicians and have weight because they presumably do have their bases in the doctors' experience, training and observation.

Defendant's counsel often feels inadequate to probe these expressions of causal connection. The feeling culminates from a belief he is no match for the doctor in the area of medical knowledge, a fact any lawyer must be willing to concede. This inequality need not leave counsel helpless. He can do a creditable and often successful job by shifting the area of combat to one in which the pairing is more equal, the field of logic.

Opinion evidence in favor of aggravation, opposed by contrary medical evidence offered by the defendant, creates a question of fact. Questions of medical fact in most, if not all, jurisdictions are determined not by doctors, but by judges, juries, referees, commissioners; laymen all. Frequently, one must admit, they are impressed by what is logical, and medicine, although not an exact science, on occasion can seem to demand a rational approach.

This brief article is not meant to imply that a logical approach in cross-examination will dictate a reversal by the doctor of his opinion. Authors of fiction to the contrary, examples of medical witnesses crumbling under cross-examination to the point that they "take it all back" are rare; and the average practitioner would consider even that an overstatement. Rather, he is aware, he must chip away at the doctor's credibility and impressiveness with the hope that the same qualities in his own witnesses will, by contrast, impel the trier of fact to their way of thinking.

Take "degree of trauma". Whether a condition has been aggravated may depend, in some cases, upon the severity of the force. If an assumed degree of trauma produces an adverse effect on a pre-existing condition is it not reasonable to assume that the greater the trauma the greater the effect and, conversely, the lesser the trauma, the lesser effect or, perhaps, none? Most medical opponents will say this is not *necessarily* so. But what we are probing is what is usually so, the rule rather than the exception to the rule. Most opposing medical witnesses take the stand determined to make as few admissions as possible on cross-examination. Thus, they will even hesitate to admit that the basic premise above is usually the case. At this

point they may be forced to appear as though running contrary to layman's logic, impressing as illogical or as a hedger.

Applied to a particular disease, the sequence might appear thus: the doctor has testified that a blow to the head has caused a detached retina in a man suffering from pre-existing myopia. The severity of the blow is an issue. He has admitted myopics may suffer a spontaneous detachment. Now, when we asked whether the severity of the trauma is a basic premise of his opinion he anticipates you want a "yes" answer (which you do) and says, instead, that it is not. It would be error to ask him "why". He may give what sounds like, and could very well be, a good reason. In this situation a follow-up line of questioning would be:

Q. Isn't it true, doctor, that the greater the trauma the more likely it is to cause a detachment?
A. That is not necessarily so.
Q. Isn't it usually so?
A. No, it is not.
Q. In other words, doctor, the less severe the blow the greater the effect, is that what you are saying?
A. I didn't say that.
Q. But you did say, did you not, that a greater trauma does not produce a greater effect?

If the witness answers "yes" to this last question drop the line of inquiry there. Laymen would expect that the doctor's answer to the first two questions should have been "yes", because it seems to be good common sense. (The third question dramatizes the conflict.) The doctor, on the other hand, is not wont to give a broad "yes". Had he done so he would have laid the foundation for your evidence on severity and *your* medical witnesses' opinions. Should he answer the last question with a denial, have the stenographer read back the first two questions and answers and stop there.

Effective use may be made of the contrast between tangible and intangible evidence, again employing the logical approach. For instance, the claim is that trauma aggravated a pre-existing osteoarthritis of the spine. The opposing doctor preliminarily admits on cross-examination that osteoarthritis is metabolic or systemic in origin and ordinarily is progressive with age.

Then one may ask:

Q. Are the presence and extent of osteoarthritis verified by x-ray?
A. Yes.
Q. Was the x-ray you saw taken after the accident?
A. Yes.
Q. Did you see any x-rays of the same part taken before the accident?
A. No.
Q. If a prior x-ray showed less osteoarthritis present you would have a firm basis for saying that he had an *increased* amount of osteoarthritis after the accident, is that correct?
A. Yes.
Q. However, lacking a prior x-ray for comparison, you are unable to *verify* that the osteoarthritis has actually shown more than a normal progress following the accident, is not that so?

The doctor must affirm the truth of this statement or be unbelievable. In the first answer he admitted that the presence and extent of the condition is *verified* by x-ray. Note that the cross-examiner in his last question re-employs the word "verify". Should it be that comparative x-rays are available, and do show an increase, the cross-examiner is not necessarily defeated. The "logical approach" embodied in the comparison of rates of progress is available.

This latter approach follows this line: a man falls from a scaffold and sustains fractures of the vertebrae with bleeding from the rectum. He is immediately hospitalized. Investigation reveals the presence of carcinoma of the sigmoid (colon). Operation is performed to remove the carcinoma and death ensues four days later. The claimant's expert witness testified to causal relationship for the death on the ground that the fall aggravated the cancer and the operation necessitated thereby was fatal. A basic reason offered is that in his opinion, the accident accelerated the rate of growth of the cancer. Cross-examination on this opinion is thus:

Q. You speak about acceleration of the rate of growth of this carcinoma and may I imply from that you believe it had a rate of growth but that rate of growth was accelerated by the accident?
A. Correct.
Q. Well, now, in order to compare the rate of growth of a carcinoma before and after a certain event, isn't it

necessary to know what rate of growth existed before?
A. It would be.
Q. And after the event?
A. It would be desirable.
Q. You don't know what the rate of growth of this carcinoma was before the accident, do you doctor?
A. I do not.

Here is made the logical point that where a condition is progressive, its rate of progress post-trauma cannot be said to have been accelerated unless one knows the rate of progress before the accident. An appellate court recognized the validity of this premise and cited the substance of this cross-examination in its opinion for reversal:

"This same physician testified that in order to determine whether the growth of the carcinoma was accelerated or not, it would be necessary to know the rate of growth before the accident. As to this, he concedes he had no knowledge." *(Backstrom v. Turner Construction Co.,* 132 N.Y.S. 2d 126).

In conclusion, theories of aggravation often may be attacked successfully by a line of questioning which appeals to the common sense of the layman because it seems to make sense. Attorneys are subjected to difficulty in matching their limited medical knowledge against a physician's. Why should they not choose a weapon more suited to them, the logical approach?

Qualify Your Psychologist

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WITH the expert witness assuming a position of greater importance in the field of torts, it is not unusual that the psychologist is taking his rightful place in this field.

Psychology, generally defined, is the study of behavior. The branch of psychology of most use to the attorney is that known as clinical psychology which has been defined by the clinical division of the American Psychological Association as:

> "A form of applied psychology which aims to define the behavior capacities and behavior characteristics of an individual through methods of measurement, analysis, and observation; and which, on the basis of an integration of these findings with data received from the physical examinations and social histories, gives suggestions and recommendations for the proper adjustment of the individual."

The clinical psychologist, according to James J. Dixon, Ph.D.,[1] is:

> "A practitioner who, theoretically, utilizes the methods and technics of his science in the investigation, evaluation, and treatment of individuals falling within the normal realm, as well as those who may be considered 'abnormal' or 'maladjusted.' The clinical psychologist's most unique and characteristic function is to contribute to the total psychologic evaluation of the patient via his specialized technics. He is expected to render an objective opinion, as to the patient's intellectual potential and efficiency, his personality structure, the dynamics of the maladjustment, his creative assets, his disabilities, the diagnosis, and prognosis."

In the tort field, the use of a psychologist is specifically indicated when there is traumatic brain damage. After a severe brain injury, there may be intellectual impairment such as loss of general intellectual capacity, memory defects or visual disturbances. There also may be various changes in the personality structure such as catastrophic reactions, irascibility, emotional lability, perplexity, impotence, and the many other threads that can be woven into the final tapestry of complete damage.

The clinical psychologist, in evaluating a patient with brain damage, relies upon psychological tests, the value of which depend upon (1) the purpose for which they are used; (2) their reliability; and (3) their validity. To mention a few, the Wechsler-Bellevue Intelligence Scale, the Rorschach test, the Bender Visual Motor Gestalt test, the Goldstein-Scheerer tests, the Goodenough Drawing test, the Mosaic test, the Make a Picture test and many, many others. In fact, there are over 663 psychological tests commercially available in the English speaking countries.[2]

Trial counsel, before using a psychologist, must determine (1) the competency of the psychologist to testify as an expert witness, and (2) the qualifications of a psychologist. Strange as it may seem, the courts in this country have, until quite recently, failed to give a precise legal definition of the psychologist.

Most of the cases pertaining to the use of a psychologist have arisen in criminal actions and therein the question concerned the sanity or insanity of the defendant under the McNaughten rule or its modifications. One of the early landmark cases is the case of *People v. Hawthorne*, 293 Mich.

[1]The Cyclopedia of Medicine-Surgery-Specialties, Vol. 11, page 459 (F. A. Davis Co.).

[2]The Cyclopedia of Medicine-Surgery-Specialties, Vol. 11, Page 459.

15, 291 N.W. 205. The facts: The defendant was prosecuted for homicide for killing his wife's paramour. The defense was insanity. The defense sought to qualify a professor of psychology as an expert witness on insanity. The psychologist was a graduate of several educational institutions, holding degrees of bachelor of arts, bachelor of divinity, doctor of philosophy and psychology. He had done graduate work at many universities throughout the United States and was not only a teacher but a clinical psychologist. He had written many articles and publications and had specialized in the particular field of psychology devoted to motivation and motives of human conduct. The trial court sustained the prosecuting attorney's objection to the competency of the psychologist as an expert on insanity. On the appeal to the Supreme Court of Michigan, one of the defendant's principal contentions was that the trial court had erred in holding a psychologist to be incompetent as an expert on insanity. Three of the eight judges on the supreme court elected to hold that the psychologist was not competent and the remaining five justices held contrary views and the court, speaking through Justice Butzel, stated:

> "I concur in affirmance, but I cannot agree with the proposition of my brother McAllister that because insanity is a disease and comes within the realm of medical science, that only physicians are competent to answer hypothetical questions on behalf of a defendant in a criminal case. The law does not require a rule so formal, and I do not think we would further the cause of justice by insisting that only a medical man may completely advise on the subject of mental condition."

Assuming that the psychologist was competent to testify, the court went on to state as to the qualifications:

> "When a non-medic is offered as an expert on subjects in the orbit of medical science, the trial court is put on guard and should take greater precautions in the preliminary inquiry to determine the witness's qualifications and the extent of his knowledge than may be necessary when a graduate of a medical school is proposed."

Assuming that most of the courts will admit that a psychologist can be a competent witness, depending upon the type of injury involved, the next question is whether or not a psychologist can be qualified to testify in a given situation, Basically, it must be remembered that whether or not a witness is qualified as an expert raises a question of law regarding the qualifications an expert must possess and a question of fact as to whether the witness possesses such qualifications. See *State v. Killeen* (N.H.), 107 Atl. 601. Once the court has decided the question of fact, the trial court, of course, will not be reversed by the superior court unless there has been an abuse of discretion.

With the exception of a recent case in the state of New Mexico—the *State of New Mexica v. Jose Franco Padilla*, 347 P. 2d 312, decided December 8, 1959—none of the courts in the United States has set up a legal definition for the clinical or applied psychologist. Several states, by licensing psychologists, have furnished a foundation which can be adopted by the courts as to the qualifications required of a psychologist as an expert witness. In the absence of licensing laws, the courts have had little to go on except what the expert himself would testify to as to his own qualifications. Jack Blumenkrantz, Ph.D.,[3] stated:

> "While there is as yet no legal definition of a professional (applied) psychologist, the current trend is for him to hold a Ph.D. (doctor of Philosophy degree). The American Board of Examiners in professional psychology has been established to provide certification of compentency, similar to the certification of the specialty boards in medicine. Several states now have certification of licensing laws for psychologists, and, in various instances, psychologists have been accepted by the courts as expert witnesses."

Dr. John MacDonald, in his work, *Psychiatry and the Criminal*,[4] stated:

> "The clinical psychologist is a specialist who has received five years of postgraduate training in clinical psychology. He holds the degree of doctor of philosophy and has spent at least one year as a psychology intern in a mental hospital, institution, or training center ap-

[3]Medical Trial Technique Quarterly, 1957 Annual.

[4]Psychiatry and the Criminal, John M. MacDonald, Charles C. Thomas publication.

proved by the American Psychological Association."

In the *Franco* case, wherein the defendant was found guilty of first degree murder, having carnal knowledge of a five year old child, and kidnapping, the question of the competency of a psychologist and his qualifications played an important part in the Supreme Court of New Mexico reversing the trial court. The Supreme Court of New Mexico recognized that it has only been within comparatively recent times that the questions as to psychologists testifying as experts has arisen and cited the case of *People v. Hawthorne* and other cases.[5] The court decided that a psychologist can be competent, but that the determination of the qualifications of the psychologist is a question for the trial judge and a matter entrusted to his sound discretion. The court stated:

"The witness stated his qualifications as to education and practical experience, but nowhere in the record does it appear that the trial court had before it any type of standard by which a comparison could be made of the qualifications of the witness and of a psychologist of recognized qualifications. According to the authorities in the field, the minimum qualifications for a psychologist before being allowed to testify as an expert is that he has had at least five years of post-graduate training in clinical psychology, has a degree of doctor of philosophy, and has spent at least one year as a psychology intern in a mental hospital approved by the American Psychological Association."

The New Mexico court went on to state that since New Mexico had not established a certification law for psychologists, that a proper witness must have at least the minimum qualifications as stated above.

Besides the qualifications of the psychologist himself being a preliminary question of fact to be determined by the trial court, trial counsel, when using the psychological tests, should establish also as a preliminary question of fact, the validity and the recognition of the tests in either the medical field or the field of psychology. The court should know whether or not the tests, collectively or individually, will enable the expert witness to determine that point about which he is going to testify. It may be argued that this is a proper matter to be brought out on cross examination, but bearing in mind the multitude of tests available to a psychologist, it would seem better practice to establish to the court's satisfaction that the tests given are recognized and valid in the field of psychology. Particularly so when the thinking of most psychologists is that because of their training and experience, they are in a much better position than others to judge which psychological tests, procedures, or devices are appropriate to an individual problem and will yield them the most valid and reliable data.[6]

So it seems that even though the psychologist is coming into his own as an expert witness and will perhaps be used more and more in the future in the trial field, nevertheless, defense counsel in particular should understand the limitations, shortcomings and the necessary qualifications of the psychologist as an expert witness.

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[5]*People v. Rice*, 159 N.Y. 400, 54 N.E. 68; *People v. McNickles* (1950) 100 Cal. App. 2d 554, 224 P. 2d 21; *In re Masters* (1944) 216 Minn. 553, 13 N. W. 2d 487; *People v. Horton* (1954) 308 N.Y. 1, 123 N.E. 2d 609.

[6]Clinical Psychologist, James J. Dixon, Ph.D., The Cyclopedia of Medicine-Surgery-Specialties, Vol. 11.

A Book Report on "Psychiatry and the Law"*

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AN ARTICLE dealing with "psychiatry and law" was originally assigned to the writer because of the apparent increase in claims and litigation involving the field of psychiatry and the use of psychiatrists as witnesses. A dearth of published and available material was found to exist on the subject after a reasonably diligent search. Since the subject of psychiatry is a relatively new science as well as a highly technical subject, we have chosen to review the excellent work of the authors of "Psychiatry and the Law."

The work of the authors represents the joint contribution of a recognized psychiatrist and a recognized professor of law embraced within 19 chapters on various phases of psychiatry and the law. Their work is as near a general treatise on the subject as has come to the writer's attention. As observed in the Foreword, the authors' chief purpose is to provide a "source book and practical guide on medicolegal psychiatry for students and practitioners of law and medicine", and in this they have admirably succeeded.

Chapter 1 is devoted to the tracing of the subject of psychiatry and the law from the early medicine man and the law-giver, going on to point out that through the passage of time the doctor and lawyer have followed divergent paths so that today in many respects they have difficulty in understanding each other — the education of the physician emphasizing experimentation and caution against the scientific hazards of generalization, with legal training stressing skill in deducing general propositions from a maze of single instances which various cases present. It is recognized that psychiatry is virtually a twentieth century science focusing its attention on the individual, while the law places its emphasis largely on society and secondly on the individual.

Psychiatry is defined as that branch of medical science dealing with diagnosis and

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treatment of mental disorders. In today's field of psychiatry there are three groups of specialists:

(1) Psychiatrists,
(2) Psychoanalysts, and
(3) Psychologists.

Psychiatrists are graduate medical doctors, recognized by various specialty boards: i.e., The Board of Psychiatry requires at least three years postgraduate training in a recognized training hospital, while the American Psychiatric Association and the American Psychoanalytic Association will admit as members only those meeting their required standards. At this present time the American Psychiatric Association shows in excess of 7,500 psychiatrists, 85 per cent being members of the American Psychiatric Association and 3,000 certified by the American Board of Psychiatry and Neurology. Eight hundred fifty-five are practicing psychoanalysts but a smaller number are actual members of the American Psychoanalytic Association.

The American Psychoanalytic Association requires in addition to a medical degree that the candidate shall have been fully psychoanalyzed himself, shall have attended special courses in the theory of psychoanalysis and shall have treated a number of patients under careful guidance. A thorough psychoanalysis requires a minimum of 250 hours.

Psychologists, the third group, are not physicians but usually hold the degree of

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M.A. or Ph.D. in psychology. It is observed that there are various types of psychology — child, social, industrial, educational, criminal and clinical. These have had special training in evaluating the intelligence and personality structure in healthy as well as mentally disordered individuals. It has been the writer's experience that the clinical psychologist normally functions as an aid to the psychiatrist or psychoanalyst particularly in the administration of the various tests such as the Rorschach, Thematic Apperception test and others. (The Rorschach (ink blots) having been developed by Rorschach, a brilliant Swiss psychiatrist, and the Thematic Apperception test being developed by Dr. Henry A. Murray at Harvard).

Chapters 2 through 8 are devoted to discussions and definitions, traits and characteristics of the (1) personality formation which the authors define as the "mental bone and marrow" out of which the individual is made; (2) the psychoneuroses; (3) the psychoses (manic-depressive and schizophrenic); (4) psychopaths; (5) sex offenders; (6) organic brain disorders (structural changes in the brain consistently demonstrable on post-mortem) which are separate and distinct from schizophrenic, manic-depressive, neurotic and psychopathic conditions, and (7) congenital intellectual deficiency.

Of particular interest to the readers of this journal should be Chapters 9 through 12 dealing with:

(a) The psychiatrist on the witness stand;
(b) The psychiatrist on the witness stand: cross examination;
(c) Eliminating the battle of experts, and
(d) The patient's privilege of silence.

Here it is observed that, "A trial is not a scientific investigation. It is not a search for objective truth. It is, as the lawyers say, an adversary proceeding . . . with the Judge performing roughly the same function as the referee or umpire", hence the doctor-witness "finds himself participating in what is both a fight and a public performance."

Concerning the "qualifications of experts" the authors observe that psychiatrists have been known to express scorn of the practice followed in most states of permitting a general medical practitioner to testify as an expert on insanity. Such criticism the authors say is based on a misunderstanding of basic legal principles and a failure to appreciate the practical difficulties. (In this latter observation the writer thoroughly concurs. One of the practical difficulties most readily called to mind is the attempted use of a psychiatrist in many of the typical rural communities where the local general practitioner is a man loved and respected by the community and eminently qualified in the general field of medicine). The authors observe that the general test to be laid down with reference to the qualification of the expert is, "Can the jury receive appreciable help from this person on this subject," with the application of the test being left to the sound discretion of the trial judge. Effective cross examination and argument may readily serve to bring home to the jury the shortcomings of the expert's qualifications. "The serious evil is not created by the general practitioner offered as an expert, but by the charlatans and quacks within the ranks of the specialists whose venality or eccentricities permit them to testify to opinions which scientific consensus would deem preposterous. No arbitrary rule of exclusion will touch these individuals."

The authors emphasize the importance of the psychiatrist having medicolegal knowledge and practicularly of having sufficient knowledge and information to make an intelligent examination, and illustrate the necessity for such knowledge and information by the instance of a psychiatrist involved in a will contest case over the estate of a 90 year old man. The medical witness, a psychiatrist who had examined the testator three months before his death, testified he had made the examination at the suggestion of the patients surgeon because of some question in the minds of members of the family as to his sanity, and that they wanted to set the old man's mind as much at ease as possible. The psychiatrist on the stand admitted he did not question the patient concerning his property nor his will, thinking that was a legal matter. On cross examination he was asked:

"Q Doctor, what, in your opinion, is it necessary for a person to possess, in the way of mental capacity, in order to validly execute a will?
"A I thought he did know something about the difference between right and wrong as to the nature of the act.

"Q Would his inability to recall the size or extent of his estate and what it consisted of play any part in determining his mental capacity for that purpose?
"A I did not ask him to do that.
"Q You have answered that. I will have the question repeated.
"A I think it is a subtle point, but I think it would certainly be an influential factor. I did not consider it fair of me in that capacity to pry into the man's private business affairs."

The foregoing is an excellent example of an expert witness not having been briefed as to the applicable law. Here he was applying the criminal test of "right and wrong" when he should have been seeking to ascertain whether the testator knew the extent of his property and estate and the objects of his bounty and affection.

Concerning expert opinions based on hypothetical questions, the authors cite Wigmore's statement concerning the hypothetical question—"one of the few truly scientific features of the Rules of Evidence"—but opine that in practice the hypothetical question is "misused by the clumsy and abused by the clever." They conclude that "most authorities" believe that experts should be allowed to express opinions directly without the necessity of the hypothetical form, leaving the basis of the opinion to be brought out on direct or cross examination, citing in support Section 9 (1) (2) of the Uniform Expert Testimony Act and Rule 409 of the Model Code of Evidence.

Concerning Cross-Examination of the Psychiatrist

The authors refer to Goldstein and Shabat's *Medical Trial Technique* reprinted from Raphael W. Marrow's *Manual of Medical Cross Examination* for a list of suggested questions to test the knowledge of neurologists. The authors point out that it is helpful to differentiate three problems to which expert psychiatric testimony is likely to be addressed, namely:

(1) Does the person have the disorder alleged?
(2) If so was it caused by the alleged incident such as head injury; and
(3) If in fact the disorder does exist, what effect, if any, did it have?

The first is truly a matter of diagnosis, and cross-examination may indicate that the witness spent an inadequate length of time in examination, or that certain of the history related to the expert witness is based upon hearsay. Further cross-examination may be along the lines that certain symptoms and signs may actually characterize several *different disorders* and that the expert has failed to make use of known tests in carrying out a *differential* diagnosis.* The authors further suggest that even where the existence of the disorder is clear it is quite important to determine whether its existence was due to the cause alleged, thus a person can admittedly be suffering from headaches or dizziness, but are these the result of the alleged injury or are they due to *different* causes—migraine, sinus or tumor? The resort to *differential* diagnosis is valuable because *unless* the witness' examinations and tests have ruled out the possibility of other diagnoses, his opinion that the condition is the result of the alleged incident is thrown open to doubt and the "doubt" becomes lethal when the cross-examiner can show that another cause *in fact existed,* such as where an expert, after attributing plaintiff's condition to a head injury, is forced to admit that syphilis could produce the same or similar symptoms, and that the claimant in fact was afflicted with and being treated for syphilis.

Elimination of the Battle of Experts

The authors suggest that the medical and legal profession might properly unite to improve the shortcomings of the partisan method of presenting expert testimony. Among these are:

(a) Requiring notice of the name and address of any expert to be called;
(b) Requiring the person examined to submit his person for examination by experts;
(c) Permitting the filing of written reports and the conferring together of the experts and the filing of joint reports;

*The authors refer to Dr. Hubert W. Smith's article appearing in Vol. 4, Vanderbilt Law Review (1950) pp. 1-62 titled "Cross Examination of Neuropsychiatric Testimony in Personal Injury Cases" as one of the most valuable in the field especially for cross-examination of experts in head injury cases. This article in itself should be of material assistance in a matter involving psychiatric or neuropsychiatric testimony.

(d) Permitting the experts to speak in terms of inferences or conclusions without the use of hypothetical questions thus allowing them to testify in lay language more understandable to the court and jury.

It is apparently the partisan character of expert testimony that has been the greatest source of dissatisfaction, for instance, more than one-fourth of the members of the American Psychiatric Association in a conducted poll listed as their chief suggestion the elimination of the partisan system of expert testimony and replacing it by a system wherein the psychiatrists are "neutrals" and represent the court. The authors point out that the law relies on cross-examination to test the witness' competency or incompetency but that too often it is not the man whose judgment and qualifications are best in the particular field but rather the old hand at testifying who is in the position to better meet the cross-examiner's questions and impress the jury. The authors observe that a simple method of meeting the situation is to authorize trial courts to appoint experts in proper cases to investigate and report. Statutes or court rules expressly permit this in England, Canada, our federal courts and in about half of the states, but the scope of the provisions vary. The practical problem recognized by the authors is the cost of such procedure; however, the Federal rule is deliberately designed to encourage selection of impartial experts by mutual agreement. They likewise refer to another statutory plan now found in about fourteen states permitting the court in a criminal case to commit the defendant to a State Hospital for a period of observation, following which the hospital makes and prepares a report in writing available to the court and to counsel. Under this plan neither side is denied the right to put its own experts on the stand. The authors do point out that where there is a conflict of opinion, juries in most instances accept the conclusion of the impartial hospital report as against that of partisan experts.

The Patient's Privilege of Silence

It is observed that in some jurisdictions a doctor is not allowed, without the patient's consent, to disclose information acquired while attending the patient in a professional capacity. This rule has been criticized as serving no useful legal purpose and in about seventeen States the doctor-patient privilege does not exist.

The authors point out that a peculiarly close relationship exists as between a psychiatrist and his patient and that there is more reason for supposing that one who consults a psychiatrist intends to speak in confidence than the automobile-accident plaintiff. The privilege, in States where it is recognized, is usually invoked in will contest cases, divorce matters and in instances of individuals seeking treatment for sexual perversion. The psychiatric patient usually confides deeply in the psychiatrist.

Whether the privilege should be retained in psychiatric cases depends upon a balancing of the importance of the purpose the privilege serves as against the importance of getting at the truth in the case at issue. If the disclosures of the patient are not such as would subject the patient to shame or affect his reputation, there is no reason why the physician should not disclose them and sound reason why in the interest of truth and justice he should be compelled to disclose them, as one court cited by the authors has observed. Likewise the privilege where applicable does not apply where the doctor observes a patient while in confinement or examines him at the instance of the other parties or the court for the purpose of testifying at a trial, for such does not constitute attending a patient in a professional capacity.

The authors further observe that in their opinion the mere fact of *bringing a suit* raising a medical issue should be deemed a waiver of the privilege, where it exists, for all communications to any physican concerning such issue.

The remaining chapters dealing with the Hospitalization of the Mentally Ill, Mental Incompetency, Veracity, Mental Disorder and the Criminal, Mental Disorder and the Criminal Law and Ounces of Prevention, are in the realm of subjects not necessarily of interest to the majority of readers of this journal and will not be summarized.

In conclusion it is observed that this work provides an excellent source reference and general treatise of the subject matter with numerous references to medical and psychiatric material and contains as well a table of cases cited and discussed by the authors. Its reading is suggested for those having occasion to make use of psychiatrists or psychologists as witnesses as well as those who desire a readable and intelligent discussion of the subject.